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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In re Applications of	)	
	)	
GTE CORPORATION,	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee	)	
	)	
for Consent to Transfer Control	)	

PETITION TO DENY OF SPRINT COMMUNICATIONS COMPANY L.P.

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ATTACHMENTS

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Sprint Communications Company L.P. ("Sprint"), by its attorneys, hereby petitions the Commission to deny the above-captioned application of GTE Corporation and Bell Atlantic Corporation.[1] The proposed transaction is contrary to the public interest and should be disapproved.

I. INTRODUCTION AND SUMMARY.

In a time of nearly unprecedented consolidation, growth and integration in numerous industries across the American economic landscape, it is easy to get swept away with enthusiasm for the alleged unbridled opportunity promised by such trends. However, the proposed merger of Bell Atlantic and GTE, like the proposed

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1 Merger of GTE Corporation and Bell Atlantic Corporation, Application for Transfer of Control (Oct. 2, 1998) ("Application"). The Application was placed on Public Notice on October 8, 1998, Public Notice DA 98-2035.

merger of SBC and Ameritech, must not be confused with other, potentially welfare-enhancing proposals. Rather, the proposed merger of Bell Atlantic and GTE must be recognized for what it is: a consolidation that would significantly reduce both actual and potential competition in the provision of numerous telecommunications services, thereby harming consumers of these services.[2] Because such a result is antithetical to the public interest, the Communications Act mandates that the Application be denied.

The diminution of competition and the increase in harm to consumers occur on several fronts:

- First, the merger would preclude competition between the parties in specific local exchange markets. Although the Application attempts to minimize GTE's planned entry into Bell Atlantic's markets prior to the merger, the public record shows that GTE would have provided direct and significant competition in Bell Atlantic's territory absent the merger. This is particularly true with respect to certain areas of Pennsylvania and Virginia where GTE and Bell Atlantic have contiguous service areas.
- Second, the merger would increase the merged entity's incentive to deny, delay and degrade services upon which competition in

2 An overview of the economic analyses supporting these conclusions is provided in the attached declaration of Dr. Stanley M. Besen, Dr. Padmanabhan Srinagesh and Dr. John R. Woodbury, "An Economic Analysis of the Proposed Bell Atlantic-GTE Merger," November 23, 1998, Attachment A ("Besen, Srinagesh and Woodbury").

several markets is dependent and thereby inhibit or prevent competition in these markets. The monopoly facilities and services under Bell Atlantic's and GTE's control are essential inputs for competitors in the downstream markets for local, long distance, and new services. While both Bell Atlantic and GTE have substantial incentive and ability to raise rivals' costs even before the merger, the increase in the number of local markets controlled by the merged entity will further increase these incentives and abilities. As explained in full by Dr. Michael L. Katz and Dr. Steven C. Salop in "Using a Big Footprint to Step on Competition: Exclusionary Behavior and the SBC-Ameritech Merger," October 14, 1998, Attachment B ("Katz and Salop"), mergers between large ILECs, such as the proposed Bell Atlantic-GTE merger, would allow the merged firm to internalize certain spillover effects from exclusionary conduct, thereby making such conduct more profitable and increasing the <u>incentive</u> to discriminate against rivals. Moreover, the merger would increase the coordination of currently separate local exchange operations thereby increasing the <u>ability</u> to discriminate.

- Third, because the merger will diminish the number of independent firms, it will reduce the efficacy of benchmarking by regulators, making it more difficult for them to restrain the abuse of market power by ILECs. Benchmarking has become a very valuable regulatory tool to this Commission since the Bell System divestiture, as explained by Dr. Joseph Farrell and Dr. Bridger M. Mitchell in their declaration, "Benchmarking and the Effects of ILEC Mergers," October 14, 1998, Attachment C ("Farrell and Mitchell"). By decreasing the number of comparable independent firms (ILECs), the proposed Bell Atlantic-GTE merger would increase ILEC incentives to provide services inefficiently and would make discrimination and other exclusionary conduct less discernible and thus more likely to occur.

- Fourth, the applicants fail to substantively address how they would comply with Section 271 of the Act; instead, the applicants merely express their hope that the requisite 271 approvals will have been obtained prior to consummation or that the merged entity will obtain "transitional relief." The applicants' cavalier approach is entirely insufficient. The Commission cannot grant the Application based upon the applicants' hope that the transaction will comply with the Act, nor is "transitional relief" available. Compliance with Section 271 requires pre-merger divestiture of GTE's interLATA operations in all of the states in Bell Atlantic's region. Until and unless the applicants can demonstrate that the merger would not violate Section 271, the Application cannot be granted.
- The applicants' claim that the merger would allow the merged parties to enter 21 out-of-region markets is neither credible nor enforceable. Further, it cannot in any event compensate for the anticompetitive effects of the merger. As analyzed in

the Besen, Srinagesh and Woodbury declaration, the strategy has not been shown to be merger-specific nor likely to result in lower prices. By its terms, the strategy requires Section 271 authority throughout the Bell Atlantic region and thus cannot be implemented within the asserted time frame.[3] Finally, even if accepted at face value, the strategy to enter as a competitor out-of-region cannot as a matter of law or policy override the anticompetitive effects of the merger in-region. Similarly, as explained in the Besen, Srinagesh and Woodbury declaration, the other efficiencies claimed by the applicants are neither supported[4] nor are they sufficient to overcome the anticompetitive effects of the merger.

* * * *

It is noteworthy that the Application is devoid of economic analysis of the likely competitive effects of the proposed merger. The Application fails fundamentally in its public interest burden on this ground alone. The only semblance of such an analysis is a commissioned analysis of the stock prices of certain of Bell Atlantic-GTE's "competitors," which the applicants claim demonstrates that investors view the transaction "not as creating or maintaining market power but . . . creating

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3 The monopoly control enjoyed by the two applicants in their respective regions is analyzed in the attached declaration of Dr. John B. Hayes, "Market Power and the Bell Atlantic-GTE Merger," November 23, 1998, Attachment D ("Hayes").

4 Indeed, both the cost reductions and revenue enhancements claimed by the applicants are little more than mere assertions.

significant new competition to AT&T, MCI WorldCom, Sprint, and SBC-Ameritech."[5] In essence, the applicants claim that because the stock prices of these entities fell upon the announcement of the Bell Atlantic-GTE merger, investors view the transaction as promoting competition between those entities. As an initial matter, reliance on the expectations of investors to assess the competitive impact of a transaction is a dubious proposition at best.[6] Indeed, Dr. Hazlett's conclusion does not follow from his statistical results, even if those results are assumed to be correct. Simply put, the analysis considers AT&T, MCI WorldCom, and Sprint only as horizontal competitors, and ignores that fact that AT&T, MCI WorldCom, and Sprint are also rivals to the ILECs and thus dependent upon the essential inputs (interconnection and access) supplied by Bell Atlantic-GTE. In these circumstances, the reduction in stock prices of interexchange companies is just as likely the result of investors' expectations that the merged entity would increase its efforts to foreclose competitive entry. Thus, Hazlett's factual findings are consistent with the Katz-Salop analysis that predicts increased incentives and ability to deny, delay, and degrade access to essential inputs.

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5 See Application at Exhibit A.4; Public Interest Statement at 6 n.2 ("Public Interest Statement") (citing attached Declaration of Thomas W. Hazlett, Ph.D.).

6 The uncertainties of the stock market make it a poor indicator of the competitive impact of the merger. The study is evaluated in the Besen, Srinagesh and Woodbury declaration.

For the reasons set forth above, Sprint urges the Commission to deny the Application. Most importantly, the proposed merger would consolidate control over facilities that are essential inputs and thereby increase both the market power of the merged entity as well as its incentive to exercise that power to the detriment of competition, consumers, and, therefore, the public interest. The risk of harm here is palpable, direct, and insoluble through any means short of denying approval of the transaction.

II. THE MERGER WOULD PRECLUDE COMPETITION BETWEEN BELL ATLANTIC AND GTE IN LOCAL EXCHANGE MARKETS.

The merger would diminish actual and potential competition in local exchange markets. It is clear that both GTE and Bell Atlantic have significant advantages as ILECs seeking to enter other local service areas, including each other's service areas. Moreover, there is significant evidence demonstrating that GTE in fact planned to enter Bell Atlantic's region.

A. Commission Precedent Establishes That Reductions In Potential Competition Resulting From ILEC Mergers Are A Substantial Public Interest Concern.

In Applications of NYNEX Corporation and Bell Atlantic Corporation, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, FCC File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985 (1997) ("*Bell Atlantic-NYNEX*"), the Commission stated that it relies upon the competitive effects analysis generated by general antitrust tools, such as the DOJ Merger Guidelines and the Herfindahl-

Hirshman Index.[7] As in the Bell Atlantic-NYNEX proceeding, the Commission should rely upon the actual potential competition doctrine in conjunction with its own expert understanding of the telecommunications industry and laws to determine the potential harm to competition posed by the Bell Atlantic-GTE merger.

Under the actual potential competition doctrine, a merger between two firms may be found unlawful where the merger eliminates the "possibility of entry . . . in a more procompetitive manner."[8] These effects are likely to be found where the relevant market is highly concentrated, entry barriers are substantial, and the merging firm is one of "a few firms that have the same or comparable advantage in entering" the market.[9] While subjective evidence of intent to enter is unnecessary to find a firm to be a likely entrant into the market,[10] both objective and subjective evidence indicating likely entry are probative.[11]

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7 See, e.g., DOJ Comment and Petition for Hearing, filed in Triathlon Broadcasting Company and Capstar Radio Broadcasting Partners, Inc., For Consent to Assignment of Licenses of Stations (Oct. 19, 1998) ("It is well established that the Commission may consider antitrust concerns when evaluating whether the public interest is being served.") (citations to U.S. Supreme Court cases omitted).

8 DOJ Merger Guidelines § 4.112 (1984).

9 Id. § 4.133.

10 See, e.g., United States v. Falstaff Brewing Corp., 410 U.S. 526, 545 (1973) (Marshall, J., concurring); Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1270 (5th Cir. 1981).

11 Subjective evidence that the firm would not have entered is in fact discounted as "it may be motivated by a wish to

The Commission has already ruled that its own analysis of the potential competitive effects of a proposed merger under the public interest standard is not rigorously tied to a specific number of other possible entrants. The Commission has reasoned that, especially in light of the highly concentrated and evolving nature of local telecommunications markets,[12] it is not bound by the set number in the Guidelines developed for stable markets. An examination of these factors warrants the conclusion that the merger will have adverse competitive effects in the markets for local exchange and exchange access in numerous local markets throughout the service territories of Bell Atlantic and GTE.

B. The Service Areas Of Bell Atlantic And GTE Are Not Competitive.

Local exchange and exchange access services have been repeatedly found by the FCC to constitute discrete relevant economic markets.[13] In *Bell Atlantic-NYNEX*, the Commission also identified relevant submarkets formed by clusters of consumers with similar demand patterns. These include large businesses/government users, medium-sized businesses, and residential/small business users (mass-market).

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influence merger litigation." See Areeda & Turner, 5 Antitrust Law ¶ 1121b2 (1980).

12 "In telecommunications markets that are virtual monopolies or that are not yet developed, however, the loss of even one significant market participant can adversely affect the development of competition and the attendant proposals for deregulation." *Bell Atlantic-NYNEX* ¶ 66, citing Areeda & Hovenkamp, 3 Antitrust Law (rev. ed. 1996) ¶ 170d ("merger with a potential competitor acquires special significance when one of the firms is a monopolist.").

13 See, e.g., *Bell Atlantic-NYNEX* ¶ 51.

Competition for these services occurs within a specific LATA as well as in a market comprising a metropolitan area. The Commission also considered, but found unnecessary to analyze, additional geographic areas in which the economic effects of the merger could be measured. A full economic analysis for these product and geographic market definitions is provided in the declaration of Dr. John Hayes, Attachment D.

These relevant markets (and submarkets) are unquestionably concentrated, with Bell Atlantic and GTE operating telephone companies enjoying virtual monopolies for these services.[14] This conclusion does not warrant extensive fact gathering; it is a matter subject to official notice within the Commission's administrative expertise. Notwithstanding the Application's mischaracterizations of these markets,[15] one need only consider the fact that not one of the states involved has found that Bell Atlantic is facing sufficient competitive entry under Track A of Section 271 -- a standard that itself falls short of a finding that the markets are robustly competitive.[16] Further, these markets are characterized by high entry barriers. As the Commission observed in *Bell Atlantic-NYNEX*, the large ILECs' failure to agree to and implement effective interconnection arrangements has significantly slowed the removal of entry

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14 See Hayes passim.

15 See Public Interest Statement at 29-30 ("Even today, Bell Atlantic is already facing extensive competition in Pennsylvania and Virginia.").

16 See infra n.131 and accompanying discussion.

barriers that the 1996 Act had set as a principal Congressional goal.[17] The added legal uncertainties created by the litigiousness of the ILECs prevents the FCC from remedying these difficulties.

C. Bell Atlantic And GTE Are Among The Most Likely Potential Entrants Into Other Service Areas, Including Each Other's.

There is also substantial objective evidence that Bell Atlantic and GTE can each be considered one of a small number of actual or likely entrants into each other's local markets. These carriers have advantages in entering local markets that are unavailable to virtually all other potential entrants. These advantages include experience in providing local services, particularly expertise in established complex systems to handle administrative capabilities (billing, order taking, customer care, etc.) not enjoyed by other possible entrants such as cable companies or CAPs. Bell Atlantic and GTE also serve adjacent areas in Pennsylvania and Virginia, enabling either of them to deploy in-region switches, transport facilities, and rights-of-way to serve out-of-region contiguous areas. In addition, adjacency would also facilitate ease of provisioning, maintenance and repair. Their adjacent operations, coupled with existing out-of-region businesses such as interLATA services (GTE only), cellular and PCS, also aid in consumer brand recognition out-of-region.[18] The applicants have themselves emphasized the

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17 *Bell Atlantic-NYNEX* ¶ 4.

18 These factors distinguish the FCC's finding in SBC-PacTel,

advantage of adjacent operations to competitive entry.[19] Further, extensive national advertising campaigns, discussed in the following sections, have made both companies household names.

Bell Atlantic and GTE also enjoy substantial advantages in negotiating interconnection agreements with other ILECs, since they have better access to information regarding the local operations of ILECs than other possible entrants.[20] Typically, CLECs trying to negotiate with ILECs are at a significant disadvantage because of the asymmetry in information available to each side in understanding issues such as technical feasibility, the costs of providing interconnection, and new means of interconnecting. Another large incumbent is far better able to assess and contest claims by an ILEC that one form of interconnection is not feasible, or too costly, and thus the product of these negotiations can be expected to produce more efficient arrangements for competitive entry. The consequences of these advantages, given Section 252(i)'s most favored nation

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where "the two merging companies' territories were not adjacent (and certainly without a major center of population and telecommunications on their border); neither company had assets, customers or a recognized brand name in the other's territory; and there was no realistic suggestion that either one had ever considered entering the other's markets for local exchange service." *Bell Atlantic-NYNEX* ¶ 69.

19 See Public Interest Statement 1, 7-8, 13.

20 As the Commission noted in *Bell Atlantic-NYNEX*, "an incumbent LEC entering an out-of-region local market would bring particular expertise to the interconnection negotiation and arbitration process because of its intimate knowledge of local telephone operations." *Bell Atlantic-NYNEX* ¶ 107.

obligations, are to improve interconnection for other CLECs and bring about competitive entry that much more efficiently and quickly.

In *Bell Atlantic-NYNEX*, the Commission found that other entrants, such as wireless carriers, cable companies and CAPs, are not as significant potential entrants as are RBOCs.[21] Given the fact that GTE is larger than four of the original seven RBOCs (measured by 1997 revenues), GTE should be included along with the RBOCs as among the first tier of potential CLEC entrants. The applicants have not put forth any persuasive case here to the contrary. And while the Commission found MCI, AT&T and Sprint to be among the most significant likely entrants in *Bell Atlantic-NYNEX*, the advantages enjoyed by Bell Atlantic and GTE in entering each other's markets make the large long distance carriers run "second" by a considerable margin among the most significant entrants.

This evidence standing alone indicates substantial anticompetitive effects of the merger because it would eliminate the potential competition these companies will face if they enter each other's territories. Moreover, the public record reflects specific evidence regarding planned entry by GTE into local markets served by Bell Atlantic in Pennsylvania and Virginia. The Application also strongly suggests that further inquiry is required in order to understand why Bell Atlantic apparently

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21 Id. ¶ 94.

tabled plans to enter GTE's markets after the Bell Atlantic-NYNEX merger.

D. Evidence Suggests That GTE Planned To Enter Bell Atlantic's Region Prior To The Merger.

Prior to its agreement to merge with Bell Atlantic, GTE appears to have devoted substantial resources and to have taken fundamental steps toward competing outside of its local service areas, including those areas served by Bell Atlantic and adjacent to GTE's local service areas -- Pennsylvania and Virginia -- as well as other Bell Atlantic states -- Connecticut, Maryland, New Hampshire, and Rhode Island. Not only has GTE established a CLEC subsidiary, GTE Communications Corporation ("GTECC"), to enter those areas, it has obtained or applied for the necessary regulatory approvals, negotiated the required interconnection agreements with Bell Atlantic (among others), and secured the necessary financing for this out-of-region strategy from its parent corporation. GTE already is authorized to provide interLATA services in all 50 states, enabling it to provide a package of local and toll services. And GTE instituted a highly extensive and successful national advertising campaign specifically intended to increase brand name awareness for this out-of-region strategy.

Until the day prior to filing the merger application -- when it withdrew its CLEC application in Virginia[22] -- GTE's actions

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22 See Application at Exhibit A.4, Declaration of Hubert Stallard ¶ 4 ("Stallard") (GTE withdrew its certification application in Virginia the day before the Bell Atlantic-GTE Merger Application was filed with the FCC). It is not clear

were those of a carrier seeking to create a nationwide local exchange presence. These procompetitive actions, taken by one of the largest telecommunications companies in the world, will be reversed by the merger.

In its 1997 Annual Report, GTE described its out-of-region strategy:

> [In 1997, w]e formed GTE Communications Corporation -- which is our competitive local-exchange carrier, or CLEC. It will be able to market the full spectrum of GTE services, including local, long-distance, wireless and data services, without regard to franchise boundaries. This unit will help us . . . become a national provider of telecommunications and data services. At year-end 1997, this group was aggressively marketing a full array of bundled services in California and Florida, with plans to market in additional states by year-end 1998.[23]

GTECC's actions in Pennsylvania and Virginia (where it has adjacent facilities) and Connecticut, Maryland, New Hampshire and Rhode Island, where it is certified to provide local exchange service, are consistent with its stated plan to enter Bell Atlantic's region by year-end 1998. In Virginia, GTECC applied to the state commission in May 1998 for a certificate to provide

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whether GTE has withdrawn its application in Pennsylvania. <u>See</u> Application at Exhibit A.4, Declaration of Daniel J. Whelan ¶¶ 7-8.

23 GTE 1997 Annual Report at 5; <u>see</u> <u>Application of GTE Communications Corporation of Virginia for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telephone Services</u>, Case No. PUC 980080, *Application of GTE Communications Corporation of Virginia* ¶ 9 (filed May 27, 1998) ("GTE Communications Corporation has been certified to provide competitive local exchange service in twenty-three states and currently does provide competitive local offerings in eight states (California, Florida, Texas, Washington, Illinois, Indiana, Kentucky and Tennessee)"). ("Virginia Application").

"competitive local exchange service throughout Virginia . . . to both residence and business customers . . . ."[24] Not only has GTE applied for or obtained certification in these states, in Connecticut and Rhode Island it has made the additional effort to re-apply to the respective state commission in order to extend its authority from resale only to facilities-based as well.[25]

In each of these states, GTE stated that it was financially qualified to pursue its competitive entry.[26] In its Virginia application, GTE touted its technical and managerial qualifications, as well as its financial qualifications for such competitive entry.

> Applicant's financial qualification is derived from the financial resources of GTE Communications Corporation, its parent entity, and ultimately, GTE Corporation. GTE Corporation will provide all funding necessary for the start-up operations of Applicant.[27]

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24 Virginia Application at 1 & ¶ 14. GTE not only applied for a certificate in Virginia, but it already had existing facilities in Virginia that it could use to provide service as a local exchange competitor. See Declaration of Jeffrey C. Kissell ¶ 15 ("Kissell") ("GTE South, an incumbent local exchange carrier, has had a small fiber ring in Virginia since the late 1980s that it uses to provide access for AT&T and MCI . . . points of presence in Bell Atlantic's territory.").

25 Application of GTE Communications Corporation to Expand its Certificate of Public Convenience and Necessity, CtPUC Dkt. No. 97-09-32, *Decision* (Oct. 28, 1997); GTE Communications Corporation Application for Expansion of Authority to Provide Local Exchange Services throughout the State of Rhode Island, filed with RiPUC (Mar. 4, 1998).

26 See, e.g., GTE Communications Corporation Application for Expansion of Authority to Provide Local Exchange Services throughout the State of Rhode Island at 4, filed with RiPUC (Mar. 4, 1998).

27 Virginia Application ¶ 8.

In Pennsylvania, GTECC attached a letter certification from GTE to its application specifying that "GTE Corporation will financially support GTECC's competitive local exchange carrier activities in the state of Pennsylvania."[28] In its other CLEC applications, GTECC similarly relied upon the financial qualification of GTE Corp. to demonstrate its financial qualification to compete as a CLEC.[29]

In its Public Interest Statement to this Commission, however, GTE implies that it is not financially capable of pursuing such CLEC entry, insofar as the applicants claim that competitive entry can only effectively be pursued with the financial backing of Bell Atlantic in conjunction with the resources of GTE.[30] However, GTE's certification applications and representations to state commissions -- as well as simple common sense -- establish that GTE has the resources to enter Bell Atlantic's service area on its own.

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28 Application of GTE Communications Corporation for approval to offer, render, furnish, or supply telecommunication services as a competitive local exchange carrier to the public in the Commonwealth of Pennsylvania within territories of incumbent local exchange carriers who are not rural telephone companies or otherwise exempt from interconnection, PaPUC Dkt. No. A-310291F0002, at Exhibit C (Apr. 9, 1998) ("Pennsylvania Interconnection Application").

29 See, e.g., GTE Card Services Inc., Application for Certificate to Provide Local Exchange Telecommunications Service at 5, filed with the FlPSC (Nov. 20, 1996) ("GTE . . . is relying on the financial strength of GTE Corporation as represented in the consolidated financial statements contained in the annual reports and Securities and Exchange Commission 10-K reports . . .").

30 Public Interest Statement at 7.

GTE's intent to enter is also evidenced by its interconnection agreements with Bell Atlantic in several states,[31] as well as GTE's efforts to create a national brand in support of its out-of-region CLEC strategy. GTE's prosecution of these interconnection agreements speaks volumes about the immediacy of its intentions to enter and compete in the provision of local exchange services. For example, in its application for approval of its interconnection agreement with Bell Atlantic in Pennsylvania, GTECC stated

> The [Pennsylvania] Agreement is an integrated package that reflects a negotiated balance of many interests and concerns critical to both parties. . . . The parties respectfully request that the [Pennsylvania] Commission <u>expedite</u> its review of the Agreement to <u>facilitate implementation of competition</u> in the local exchange market.[32]

Perhaps not surprisingly in light of its present aspirations, GTE now urges the Commission to ignore this evidence of its anticipated entry in Bell Atlantic's region, claiming that the agreements were merely "cloned" from agreements of other CLECs.[33] This assertion is wholly without merit.

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31 <u>See, e.g.</u>, <u>Joint Petition of Bell Atlantic - Pennsylvania, Inc. and GTE Communications Corporation of an Interconnection Agreement Under Section 252(i) of the Telecommunications Act of 1996</u>, PUC Dkt. No. A-310291F0002, *Joint Petition* (filed Aug. 28, 1998) ("Pennsylvania Interconnection Application"); <u>Joint Application of Bell Atlantic - Virginia, Inc. and GTE Communications Corporation of Virginia of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996</u>, Case No. PUC 980120, *Joint Application* (filed Aug. 13, 1998).

32 Pennsylvania Interconnection Application ¶¶ 4, 9 (emphasis added).

33 <u>See</u> Kissell ¶ 15.

Section 252(i) of the 1996 Act specifically provides for most favored nation adoption of other interconnection agreements in order to expedite competitive entry. A CLEC's election under Section 252(i) does not somehow render the agreement less meaningful. GTE has elsewhere demonstrated a remarkable appreciation for the value of Section 252(i) elections; it challenged Sprint's right to make a Section 252(i) election in no fewer than nine states. Sprint was forced to pursue costly litigation, including two court appeals, before GTE would (apparently) abandon its frivolous position. Thus, the fact that GTE's interconnection agreements may have been established through 252(i) elections is not relevant; the interconnection agreements are clear evidence of GTE's entry intentions.

Further evidence of GTE's intent and ability to enter other local exchange service areas, including Bell Atlantic's, is found in its recent national advertising campaign. GTE retained the national advertising firm of Ogilvy & Mather to launch this campaign with the stated intent to become a "national player."[34] In his 1998 Chairman's Message, GTE's Chairman Charles R. Lee discussed the campaign:

> "People Moving Ideas" is both the theme of this annual report and our new national advertising campaign. These three words capture the spirit and direction of today's GTE: We are a company on the move. We're people who move ideas, one person to another, one company to another, anywhere in the world.[35]

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34 "A Bigger Player," Delaney Report, No. 1, Vol. 9 (Jan. 12, 1998).

35 GTE 1997 Annual Report at 2, Chairman's Message, Charles R.

Moreover, GTE's traditional advertising focus has "emphasized national, strategic branding."[36] As explained below, this evidence further demonstrates that GTE is a likely potential entrant in its own right, despite GTE's protestation to the contrary.

In his affidavit, Mr. Kissell asserts that "GTE's brand has little weight outside of its wireline and wireless territories,"[37] which allegedly limits its ability to enter as a CLEC. This claim, however, is contradicted by recent public statements of Glen Gilbert, GTE's Vice President of Advertising stating just the opposite -- that GTE's national campaign has been effective in out-of-region markets:

> Before we started our "People Moving Ideas" campaign, our target audience wasn't sure exactly who GTE was. . . . Our research suggests awareness is now up in and out of our franchise markets, as is purchase intent. Now we need to take the next step and say now that you know us, here's why we're beneficial to you with different products.[38]

Lee, Chairman and Chief Executive Officer (Feb. 20, 1998).

36 Jeffrey D. Zbar, The Business Marketing Top 100, Advertising Age Website, <http://www.adage.com/news_and_features/special_reports/bm100-1995/top3.html> ("The branding focus on GTE's telecommunications core business has gone on for years, said Edward MacEwen, VP-corporate communications. While regional telecommunications business-including telephone, wireless, data service, telephone directories and the company's in-flight Airfone product . . . . receives what he called 'tactical advertising' through short-term campaigns, the company traditionally has emphasized national, strategic branding.") (visited Nov. 17, 1998) (emphasis added).

37 Kissell ¶ 11.

38 "Strategies focus on products, services: Telecommunications -- Pitch to niches a priority over image ads," Advertising Age, Oct. 5, 1998, at s20 (emphasis added).

Curiously, and in contradiction to this, Mr. Kissell further asserts that "[n]either company [has] the plans or the resources required to create a national brand on its own."[39] Mr. Kissell's claim that GTE lacks the resources to create a national brand is equally contrary to the facts: GTE's 1997 total U.S. advertising budget was the 109th largest for any corporation or entity -- $185.4 million.[40] GTE's efforts to suggest that it lacks certain resources to enter Bell Atlantic's and other "necessary" regions are simply contrary to the facts. Its protestations to the contrary notwithstanding, GTE is one of a small group of likely potential entrants into Bell Atlantic's region and accordingly, the Application must be denied.

E. Bell Atlantic's Statements Suggest That It Planned To Enter GTE's Region.

Just as GTE is a likely entrant into Bell Atlantic's region, Bell Atlantic is a likely entrant into GTE's region. Though Sprint is not privy to internal documents and reports that would

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39 Kissell ¶ 11.

40 Numerous corporations maintain strong national brand names while spending less on advertising than does GTE. The following are a representative sample: Goodyear Tire & Rubber Co. ($175.5 mil.); The Gap ($174.9 mil.); BMW ($160.9 mil.); Dominos Pizza ($159.6 mil.); CompUSA ($142.4 mil.); Reebok International ($137.4 mil.); CBS Corp. ($134.4 mil.); Federal Express Corp. ($125.6 mil.); Bausch & Lomb ($117.8 mil.); Xerox Corp. ($116.6 mil.); Delta Air Lines ($109.2 mil.); Apple Computer ($107.9 mil.); United Parcel Service of America ($100.5 mil.); Staples, Inc. ($85.2 mil.). See R. Craig Endicott, "43rd Annual: GM Knocks P&G from Top Spot; Ends Package-Goods Giant's Consecutive Streat at 7: Leaders Swell Spending by 8.6%, to $ 58 Billion," Advertising Age, Sept. 28, 1998, at s8.

shed additional light upon Bell Atlantic's intentions prior to agreeing to merge with GTE, Bell Atlantic's corporate characteristics, geographic coverage, and abilities suggest that it is one of a small number of likely entrants into GTE's local exchange region. Moreover, affidavits to the merger application suggest that Bell Atlantic once had, even if it no longer has, plans and reports regarding such entry. The Commission must undertake further inquiry of these initial plans and the causes for their abandonment.

Many of the explanations Bell Atlantic proffers for not entering the adjacent territory of GTE in Pennsylvania and Virginia cannot withstand even minimal scrutiny. Bell Atlantic denies any intent or interest to compete in any of GTE's territories, but then explains that it has in fact pursued several different competitive opportunities involving Dulles International Airport in Virginia. It also describes a "possible alliance" with a significant cable television-based CLEC (Cox) in Virginia Beach.[41] Since these areas are not represented to be the only competitive ventures considered by Bell Atlantic into <u>any</u> of GTE's territories, there may well be others.

There are significant areas of governmental presence and dramatically growing commercial activities in such areas as Norfolk and Manassas, Virginia. In addition to the well-known military presence, NationsBank, for example, maintains its mid-Atlantic headquarters in Norfolk. Moreover, Norfolk has been

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41 <u>See</u> Stallard ¶¶ 5, 13-14.

central to the growth of technology-based businesses in Virginia. According to a recent study by Microsoft Corporation, Norfolk leads the state of Virginia with 1,152 high-tech companies, having total sales of over $1 billion dollars.[42]

Mr. Stallard claims that Bell Atlantic, unlike other CLECs, would be prevented from going after such larger users:

> I doubt that Bell Atlantic, as the largest carrier in the state, would be permitted to simply cherry-pick the most lucrative customers of the smaller telephone companies elsewhere in the state. To the contrary, I expect that we would be saddled with more onerous requirements to serve a large customer base, making the economics of providing competing local service unattractive.[43]

This statement is grounded in pure conjecture, and indeed is inconsistent with the very business activity described with respect to Dulles Airport and Virginia Beach. In addition, it appears to be a misreading of Virginia state law.[44] Bell

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42 See "Microsoft and Microsoft Solution Providers Invest in Development Of Richmond IT Market; Virginia Leads Region in High Tech Growth -- Richmond, Charlottesville, Norfolk Strong Players," PR Newswire, Nov. 11, 1998, available in LEXIS, News Library, Crnews File.

43 Stallard ¶ 16.

44 Virginia regulations state: "to the extent economically and technically feasible, the new entrant should be willing and able to provide service to all customers in the same service classification in its designated geographic service area in accordance with its tariff offerings." 20 Va. Admin. Code § 5-400-180 (1997) (emphasis added). This does not appear to require the provision of service to both residential and business customers, nor does it require immediate, ubiquitous coverage if doing so is economically infeasible. See also Va. Code Ann. § 56-265.4:4C.1 (Michie 1995). Depending upon the particular market circumstances, for a state government to do otherwise may even constitute the erection of an insurmountable barrier to entry to competition in the local exchange, contrary to the 1996 Act.

Atlantic is under no special obligation in this regard. Virginia state regulations specifically classify and treat incumbent LECs such as Bell Atlantic as a "new entrant" for the provision of service outside its region -- the same classification as any other CLEC.[45]

Bell Atlantic's implausible reasons for non-entry, while other CLECs are entering Virginia and while GTE's number of access lines continues to grow at an industry-leading rate of 8 percent,[46] appear to be litigation/merger-motivated. Indeed, Mr. Stallard's declaration alludes to the existence of analysis and reports regarding earlier plans for entry, apparently abandoned around the time Bell Atlantic agreed to acquire NYNEX:

> I am aware of no analysis undertaken <u>since 1996</u> by Bell Atlantic of the merits of establishing a competing local exchange operation in GTE's Virginia territory. <u>Since</u> the NYNEX merger, no group or person within Bell

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<u>See</u> 47 U.S.C. § 253 (preempting any state or local statute or regulation that has the effect of prohibiting the provision of intra- or interstate telecommunications service).

45 <u>See</u> 20 Va. Admin. Code § 5-400-180 ("'New entrant' means an entity certificated to provide local exchange telephone service in Virginia after January 1, 1996, under § 56-265.4:4C of the Code of Virginia. <u>An incumbent local exchange telephone company shall be considered a new entrant in any territory for which it obtains a certificate to provide local exchange service on or after January 1, 1996, in accordance with these rules and which is outside the territory it is certificated to serve as of December 31, 1995</u>.") (emphasis added).

46 "GTE Announces Strong Financial Results, Generating Double-Digit Consolidated Revenue Growth and 11% Core EPS Growth in Second Quarter," Edge (July 27, 1998); <u>see also</u> *Bell Atlantic-NYNEX* ¶ 63 ("[W]e also consider matters that would be material to the entry of all precluded competitors as a class. . . [such as] whether the relevant market is expanding. . . .").

Atlantic has had the mandate of undertaking such an analysis.[47]

The Commission must investigate these earlier analyses, and the actual reasons for their (apparent) abandonment.[48]

III. THE INCREASE IN LOCAL MARKETS CONTROLLED BY THE MERGED ENTITY WOULD HAVE SIGNIFICANT ANTICOMPETITIVE EFFECTS IN LOCAL, LONG DISTANCE AND NEW SERVICES MARKETS.

ILECs enjoy monopoly control over interconnection and access services -- the inputs necessary for the provision of numerous downstream services, including local exchange, long distance, and new services. ILECs can exploit their monopoly power to maximize profits either by raising the price of interconnection charged to rivals or by impairing their access to essential inputs. Because interconnection prices are subject to regulatory oversight, non-price exclusionary behavior is more readily available to ILECs and far more difficult to regulate and correct. As explained by Drs. Katz and Salop, a discriminatory interconnection policy will be profitable for an ILEC so long as its gains in the downstream retail market exceed the revenues it foregoes from wholesale interconnection with rivals.

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47 Stallard ¶ 5 (emphasis added); see id. ¶ 9.

48 Without full understanding of the actual facts, the Commission cannot adequately consider the merits of the Application. See *Bell Atlantic-NYNEX* ¶ 75 ("[W]e consider all plans . . . as potentially relevant to the analysis of market participants. Accordingly, the facts and circumstances concerning such planning should be forthrightly presented to the Commission.").

Significantly, the adverse effects from ILECs' discriminatory practices go far beyond the harm imposed on competitors. As explained by Drs. Katz and Salop:

> The market suffers efficiency losses because the incentives to invest in R&D and physical infrastructure to provide these competitive local and long-distance services are reduced. Moreover, the costs of retail services will be increased, which can be expected to raise the retail prices paid by consumers and thus lower consumer welfare and suppress output below efficient levels.[49]

Increasing the number of local markets within the merged entity's control would give it an increased ability and incentive to disadvantage rivals by discriminating in interconnection or refusing to deal altogether. <u>This incentive and ability are heightened beyond those already held by Bell Atlantic and GTE separately</u>. As explained by Drs. Katz and Salop, the anticompetitive incentives of ILECs to engage in exclusionary conduct increases substantially as the size of their monopoly service areas increases. Thus, the merger would have serious anticompetitive effects on new entrants into local telephony, would adversely affect competition between ILECs and IXCs both in anticipation of and when they are free to enter long distance markets, and will delay and potentially foreclose new innovative services and/or combinations of services that threaten the BOC monopoly.

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49 Katz and Salop at 33.

A. Anticompetitive Effects On Local Markets.

In each local market, Bell Atlantic and GTE have the ability to exercise monopoly power over essential inputs in order to deter new entry.[50] This is of course the fundamental insight of the 1996 Act, and its imposition of numerous obligations upon incumbent telephone companies to provide the necessary inputs on a commercially viable basis. As a matter of legislative finding, then, competitors in local markets are especially vulnerable to discrimination by the incumbent monopolies.[51]

However, discriminatory conduct is especially difficult to regulate since the availability of many of the needed inputs for local telephony interconnection is still uncertain. In some cases, this uncertainty flows directly from litigation brought by GTE, Bell Atlantic, and other large ILECs.[52] In other cases,

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50 See generally Hayes at 21-22.

51 It should be noted that the RBOCs will retain considerable monopoly power even when the Section 271 standards for entering long distance markets are met.

52 The litigation pursued by each GTE and Bell Atlantic in efforts to forestall implementation of the 1996 Act is listed in Attachment H.

Another source of uncertainty can be created when ILECs take advantage of regulatory changes for anticompetitive purposes. For example, Bell Atlantic has demonstrated a disregard for the most favored nation provision of Section 252(i) of the Act. On October 23, 1998, Sprint requested that Bell Atlantic make available to Sprint the interconnection terms and conditions set forth in the Bell Atlantic-Maine/COMAV Telco, Inc. contract approved July 2, 1998, the Bell Atlantic-Rhode Island/Brooks Fiber contract effective April 10, 1997, and the Bell Atlantic-New Hampshire/Freedom Ring Communications, L.L.C. contract approved January 13, 1997. As of November 18, Bell Atlantic had not provided the requested documents despite repeated telephone inquiries, which prompted a letter of that date such as OSS, complete standards and interfaces have either not been implemented or even designed and agreed upon by the industry. Performance measures that would monitor discriminatory provisioning are similarly not in place. Access to other necessary inputs (UNEs, etc.) is also in doubt because of restrictions placed on such access by the large ILECs.[53] All of these factors point to the ability of Bell Atlantic and GTE to "deny, delay or degrade" access, as Drs. Katz and Salop explain.[54] For the reasons explained in detail in their declaration, briefly summarized below, the merger would increase the merged entity's incentive to act on this ability.

Discrimination practiced in one local market creates effects in other local markets. When an RBOC currently engages in discrimination against a CLEC, it weakens that CLEC's ability and incentive to enter and compete in other regions. As explained by Drs. Katz and Salop, "if a CLEC suffers lower quality or higher

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indicating that enforcement action by the appropriate state commissions would be requested if the agreements were not forthcoming. On November 19, Bell Atlantic responded by claiming that the Commission's recent decision regarding ISP traffic justifies modifications of the previously-approved interconnection agreements, and that Bell Atlantic would not execute any proposed agreements absent such modifications.

53 See generally Affidavit of Kevin E. Brauer, Attachment E ("Brauer").

54 See Katz and Salop at 17; see also Farrell, Joseph, "Creating Local Competition," 49 Fed. Comm. L.J. 201, 207 (Nov. 1996) (An ILEC's ability to deny, delay or degrade access is a problem that is "hard to regulate away, because the withdrawal of cooperation from rivals may be subtle, shifting, and temporary, but yet have real and permanent effects.").

costs, reduced market share, and lower profitability in one region, those factors will reduce the likelihood that it enters other regions"[55] or will cause the CLEC "to enter [other regions] at a lower scale, with higher prices, or reduced service offerings."[56] Especially for potential entrants planning to enter at a sufficiently large scale as to include numerous major markets, i.e., national CLECs such as major IXCs, the discrimination practiced in one region or one local market may impair their national or multi-regional plans.

Thus, the discriminating ILEC is not able to capture the full benefits of its discrimination because its misconduct raises its rivals' costs both inside and outside the discriminating ILEC's region; in other words, the discriminating ILEC's misconduct "spills over" into the region of other ILECs, which in effect "free ride" on the misconduct of the discriminating ILEC.

These spillover effects are heightened where, for example, CLEC entry entails common research, product development and marketing costs that must be covered by the sum of the CLEC's market-specific profits. Because these conditions hold for large scale CLECs, ILEC discrimination in one region against such firms reduces their profitability and thus the likelihood of entry in all regions.

Discrimination practiced by one ILEC in one market therefore creates anticompetitive spillover benefits for other ILECs

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55 Katz and Salop at 42.

56 Id.

controlling other local markets. The merger increases the extent to which this effect becomes internalized, because it increases the number of local markets under the control of the merged entity. Thus, the larger the ILEC "investing" in discrimination the more fully it is able to appropriate the gains from its "investment."[57] By increasing the size of the "footprint" of the merged entity, the merger increases the rewards of discrimination and thus makes it more certain to be practiced in both Bell Atlantic's and GTE's service areas.

Drs. Katz and Salop identify several detriments to the public interest that will result from the merged entity's increase in exclusionary conduct. Obviously, rival CLECs will be injured and will become less effective competitors to the ILECs. As competition is weakened, consumers will suffer higher prices and reduced quality and choices, resulting in reduced consumer welfare. This harm is magnified if excluded or disadvantaged competitors could have offered consumers new services, lower cost services, or higher quality services absent the discriminatory practices of the ILEC.

The fundamental basis of the concerns described by Drs. Katz and Salop -- the increased harmful incentives and ability to disadvantage rivals flowing from the aggregation of horizontal

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57 Moreover, the merged entity may benefit in multiple markets from exclusionary behavior practiced in one market if it gains "a reputation among entrants as a firm that excludes rivals, and thereby may deter the entrants from attempting to enter to begin with, or it may slow down their entry plans." Katz and Salop at 41 n.56; see Areeda & Hovenkamp, 3 Antitrust Law ¶ 727g (1996).

monopolies -- is not new to competition jurisprudence. Indeed, the seminal Supreme Court case on monopoly leveraging fifty years ago specifically alluded to the dangers of increasing the number of local monopolies held by a firm bent on leveraging its power:

> A man with a monopoly of theaters in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a town where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places.[58]

As recognized in this seminal case and described in detail by Drs. Katz and Salop, the statutory mandate in favor of competition in the local loop dictates that the Commission must not allow the proponents of the merger to obtain such a large footprint that they can crush local competition.

B. Anticompetitive Effects On Interexchange Markets.

A similar analysis yields the conclusion that the merger would also produce anticompetitive effects in long distance markets, once the merged firm gains Section 271 authority. Again, as Drs. Katz and Salop demonstrate, the incentive and ability to discriminate in the provision of access to IXCs exist pre-merger, and they worsen with the merger.

As long as Bell Atlantic and GTE succeed in maintaining their dominance in their local markets, "they have the power to

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58 United States v. Griffith, 334 U.S. 100, 107 (1948) (Douglas, J.)(emphasis added).

technically discriminate in favor of their own competitive long-distance operations."[59] Mr. Hatfield, now Chief, Office of Engineering and Technology, has explained that recent developments in local networks have in fact increased the risk of technical discrimination. The development and deployment of intelligent (software-driven) networks, in conjunction with the demand for multimedia applications, materially changes the environment from the traditional, standardized voice and data interconnections to a substantially more dynamic environment in which individual customers and carriers can be given customized arrangements to enable either more efficient use of traditional services and/or new services. This complexity, while making new services possible, also gives the ILECs new opportunities to favor their own operations.

The merger increases the incentive to discriminate because the merged entity is able to secure a larger share of the benefits of discrimination than either ILEC can secure separately. The merger will allow the merged entity to capture the benefit of its exclusionary actions on both ends of the call in both Bell Atlantic's and GTE's region. Thus, by internalizing the payoff (the anticompetitive spillover benefits), the merger makes discrimination more profitable and thus more likely.

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59 Affidavit of Dale N. Hatfield, Ex. H to Comments of MCI Communications Corp. (filed in FCC CC Dkt. No. 97-137, Application of Ameritech Michigan Pursuant to Section 271 to Provide In-region, InterLATA services in Michigan) ("Hatfield").

The merger would exacerbate the ability to discriminate as well. An IXC requires interconnection at both ends of the call in order to provide service. As described by Drs. Katz and Salop, "[i]f the ILEC providing terminating access to the IXC denies or degrades that access, then an ILEC competing with the IXC to offer long distance service at the originating end also will benefit."[60] Moreover, with the merger, the amount of traffic that would originate and terminate in-region, i.e., in the combined region of the new Bell Atlantic-GTE, would materially increase. Sprint estimates that the new firm would terminate 43% of the minutes that it controls on the originating end, which compares to a weighted average of 36% for the two companies separately. Thus, the merger would increase the number of minutes controlled at both ends by about 20%. An even more dramatic increase occurs for traffic that originates in GTE's territory. Only 16% of that traffic terminates in GTE's territory today but 29% would terminate in the combined territory of Bell Atlantic and GTE after the merger. The fact that considerably more traffic will become "in-region" for both ends of the call means that the merged entity can raise its long distance rivals' costs at both ends of more calls.

C. Anticompetitive Effects On New Services.

A comparable analysis holds for new services and/or combinations of services. The Commission must fully consider the ways in which these new service providers (or combined service

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[60] Katz and Salop at 41.

providers, or "CSCs") are put at risk by the increased incentives and opportunities for discrimination described herein: service innovation is a stated priority of this Commission.[61] As discussed above, technical advancements to local exchange networks make possible and desirable customized access and interconnection arrangements. Competitors' needs to acquire ILEC inputs in nontraditional forms or in new price configurations gives the ILECs an improved opportunity for denial and delay notwithstanding the most vigilant regulatory oversight.

As carriers search for new, innovative ways to exploit technology to give customers service improvements, they will require access to new and additional capabilities in the local exchange network. In Sprint's case, there is no better example of this than Sprint ION, or Integrated On-demand Network. In order to bring this new and desired set of services fully to market, Sprint will need modifications to standard access and interconnection arrangements.[62]

As Mr. Hatfield explained in the FCC's Michigan 271 proceeding, ILECs can discriminate against competitors or potential competitors in such cases through outright refusals of appropriate interconnection arrangements or by "slowrolling"

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61 See Inquiry Concerning the Deployment of Advanced Telecommunications Capability, CC Dkt. 98-146, *Notice of Inquiry* (rel. Aug. 7, 1998); Inquiry Concerning the Deployment of Advanced Telecommunications Capability, CC Dkt. 98-146, *Notice of Proposed Rulemaking* (rel. Aug. 7, 1998).

62 See Brauer passim.

competitors. "The ability to refuse or delay such requests puts Ameritech in the position of controlling the development of new and competitive services, both as to whether the new service is created at all, or more subtly, when it comes to market and who can provide it."[63]

The combination of GTE and Bell Atlantic would increase these ILECs' incentives to refuse to cooperate for new services like ION, because, like the effects in local and long distance, the combined entity's presence in a very large number of markets means that the rewards of discrimination in one market are more fully captured in the larger region.

Two of the mechanisms that create these spillover effects for CSCs are the same as those for CLECs and IXCs. Like CLECs and IXCs, CSCs (like Sprint ION) need access to ILEC facilities and to interconnect with ILEC networks. As described above, an ILEC that discriminates in the provision of these inputs creates anticompetitive benefits for other competitors of the CSCs. Similarly, some if not most CSCs (like Sprint ION) confront common fixed costs and investment decisions that affect more than one market, as well as other economies of scope.[64] Denial of these economies in one market effectively denies them in all markets, to the detriment of competition both inside and outside the merged entity's service area.

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63 Hatfield at 21.

64 Affidavit of Gene Agee passim, Attachment F ("Agee").

The third source of spillovers for CSCs is an application of the network effect. For CSCs such as Sprint's ION, which are in essence a network of services the value of which rises as more customers are added to the network, discrimination in one market will ripple throughout other markets. Where a service (like Sprint ION) offers increased value to subscribers for on-net communications, exclusionary conduct that reduces the number of subscribers in one region reduces the value of the service in other regions. As a result, the payoff to the RBOCs from exclusionary behavior is materially greater post-merger.[65]

D. The Commission Should Deny The Application On The Basis Of These Adverse Vertical Effects.

The preceding demonstrates that the competitive consequences of the merger are unambiguously negative. As shown, the vertical effects in the local, long distance, and new services markets are anticompetitive because the merger increases the incentive and the ability of the merged firms to exploit their monopoly control over interconnection and access services necessary to the provision of those downstream services.[66]

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65 See Katz and Salop at 44-45; Agee at 11-13.

66 In a footnote, the applicants contend without analysis that the Commission's jurisdiction over the Application is limited by Section 2(b) of the Act, that the Commission's public interest analysis of the transfer of licenses and certificates is limited to the interstate uses of those authorizations, and that the Commission lacks authority to enforce Section 7 of the Clayton Act with regard to this merger. The Commission rejected these arguments in *Bell Atlantic-NYNEX*, stating that "[t]here is long-standing precedent supporting fulsome public interest analyses of the competitive implications of transfers of Title II certificates and Title III licenses, and for review of

These consequences warrant the conclusion that the merger is contrary to the public interest. The Commission has repeatedly reviewed transactions for their vertical effects, including the likelihood of increasing incentives to raise rivals' costs through price and non-price discrimination. See, e.g., Merger of MCI Communications Corp. and British Telecommunications plc, GN Dkt. No. 96-245, *Memorandum Opinion and Order,* 12 FCC Rcd. 15351, 15412 (1997) ("we are concerned whether the merger . . . will increase the ability or the incentive of the vertically integrated firm to affect competition adversely in any downstream end-user market"); Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended, ISP-95-002, *Declaratory Ruling and Order*, 11 FCC Rcd. 1850, ¶¶ 58-60 (1996). In the specific context of its review of prior ILEC mergers, the Commission has expressly stated its concern not only for the market power and possible misconduct that characterize the RBOCs pre-merger, but also "the incremental increase in that power or misconduct that will result from the proposed transfer." Applications of Pacific Telesis Group and SBC Communications, For Consent to Transfer Control of Pacific

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larger merger transactions even where the Commission authorized licenses represent only a very small part of the overall transaction," and that "the public interest analysis necessarily includes a review of the nature and extent of local competition, as exemplified by the fact that Section 271 of the Act specifically applies the public interest standard to, inter alia, a review of local market conditions." *Bell Atlantic-NYNEX* ¶ 35.

Telesis Group and its Subsidiaries, Report No. LB-96-32, *Memorandum Opinion and Order*, 12 FCC Rcd. 2624, ¶ 42 (1997); see *Bell Atlantic-NYNEX* ¶ 120 (rejecting argument made by opponents because they had not shown how the merger would "increase applicants' incentive or ability to engage in non-price discrimination"). Here, the showing has been plainly made; both the incentive and the ability to engage in anticompetitive conduct worsen with the merger.

The Commission has plenary authority over questions of industry structure. The Commission's statutory mandate extends well beyond merely correcting bad conduct; it obligates the FCC to act affirmatively to assure efficient industry structures that themselves will minimize such conduct. On numerous occasions, reviewing courts have upheld the FCC's use of its broad authority to prescribe a particular industry structure in order to achieve perceived benefits or to avoid potential problems.

The FCC's initial Computer Inquiry proceeding provides a clear example of such action. In Computer I, the FCC promulgated regulations that required common carriers to provide non-regulated data services through a structurally separate corporate entity. The Second Circuit upheld the FCC's authority to regulate common carrier entry into the unregulated field of data processing services:

> The burgeoning data processing activities of the common carriers pose, in the view of the Commission, a threat to efficient public communications services at

> reasonable prices and hence regulation is justified under its broad rule-making authority.[67]

In so doing, the Court rejected petitioners' attempts to narrow the FCC's authority.

> It is irrelevant that the [separation] rule is aimed at potential rather than actual domination or restraints, or that the Commission is not certain that the developments forecast will occur if the rule is not enacted.[68]

The FCC's authority over the structures of the industries it regulates extends to outright proscription of certain entities participating in some markets. The FCC's cable-telephone cross-ownership rules promulgated in 1970, and eventually removed by Congress after the rules had served their purpose, are a prime example of this.[69] In reviewing the agency's initial decision, the Fifth Circuit explained the Commission's broad authority under the Communications Act, specifically relying upon Sections 151, 152(a), and 214:

> The Commission is obliged to discharge its responsibilities in this area as best it can and it has chosen in this instance to implement the national policy by limiting the involvement of common carriers, over which the Commission has unquestioned jurisdiction, in CATV operations. . . . Although [the

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67 GTE Serv. Corp. v. FCC, 474 F.2d 724, 730 (2d Cir. 1973).

68 Id. at 731 (citation omitted). In Computer II, the Commission required AT&T to provide data services through a separate subsidiary and once again the appellate court deferred to the Commission's determination of the appropriate industry structure. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

69 These rules were ultimately codified by Congress, and subject to constitutional challenges. See Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994). The litigation was mooted by the amendments made by the Telecommunications Act of 1996.

FCC] <u>does not yet know how broadband cable services will or should develop, it is unwilling at this point to allow the telephone companies to pre-empt the field simply by virtue of their control over means. . . . [T]he elimination of this danger is consistent with the Commission's broad duties under the Communications Act</u>.[70]

These cases demonstrate the prophylactic nature of the FCC's powers over industries it regulates. Plainly the FCC has the authority -- indeed the obligation -- to consider transactions in light of whether they promote efficient market structures. It need not and must not acquiesce in proposals that force it to await the inevitable inefficient outcomes and search for after-the-fact remedies. The proposed combination will harm both competition and consumers; the Commission must avoid this result by denying the Application.

IV. THE MERGER WILL DIMINISH THE EFFECTIVENESS OF REGULATION BY REDUCING THE NUMBER OF AVAILABLE BENCHMARKS.

The Communications Act requires common carriers to offer services with "just and reasonable" terms and conditions, and common carriers may not engage in "unjust or unreasonable discrimination" in their provision of services.[71] Similarly, ILECs are required to provide interconnection to other carriers on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[72] These matters must be resolved by regulation, at present, due to the substantial and persisting

70 <u>General Tel. Co. v. FCC</u>, 449 F.2d 846, 854-857 (5th Cir. 1971) (emphasis added) (citation omitted).

71 47 U.S.C. §§ 201(b), 202(a).

72 47 U.S.C. § 251(c)(2)(D).

market power wielded by the ILECs resulting from their monopoly control of bottleneck facilities. One key way in which the Commission can determine whether common carriers are meeting their statutory obligations is to compare the varying practices of different carriers. As explained in full in the attached declaration of Dr. Joseph Farrell and Dr. Bridger Mitchell, "Benchmarking and the Effects of ILEC Mergers," benchmarking is a significant regulatory tool.

Benchmarks aid the Commission in overcoming the substantial asymmetry in information availability that otherwise impedes effective regulation. For example, benchmarking allows the Commission to better assess what practices are technically feasible, to ascertain whether rates are reasonable, and to scrutinize unusually poor performance and remedy it. As the number of comparable carriers decreases through merger, however, the Commission's ability to establish and rely on benchmarks declines. And as regulatory effectiveness diminishes, the risk of detection of misconduct decreases, making engaging in such misconduct less costly and therefore more likely. This predictable increase in anticompetitive behavior constitutes an independent basis for denying the pending Application.[73]

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73 Bell Atlantic's CEO suggested to the Commission that other entities would be more appropriate benchmarks than its ILEC brethren. This suggestion is without merit. Whatever the future structure of the industry, ILECs such as Bell Atlantic and GTE possess substantial and persisting market power by virtue of their control over essential inputs. Until and unless this market power is dissipated by substantial competitive entry, benchmarking of the rates, terms and conditions set by ILECs for use of these

A. Benchmarking Is An Essential Regulatory Tool.

The ability of regulators to use benchmarks for ILEC regulation since the divestiture of AT&T has been well-recognized:

> There is a lot of evidence that the break-up and other recent developments have enhanced regulatory capability . . . . [T]he existence of seven [R]BOCs increases the number of benchmarks that can be used by regulators to detect discriminatory pricing . . . . Indeed, federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements . . . and in comparing installation and maintenance practices for customer premises equipment.[74]

The Commission must make complex decisions regarding the pricing of monopoly services and inputs (e.g., interstate access) and the quality of such services and inputs (e.g., access to UNEs). However, the FCC's ability to perform these tasks is greatly impaired by the fact that it inevitably has less information than do the firms that it regulates. As explained by Drs. Farrell and Mitchell, benchmark regulation has been used in material ways to ameliorate this fundamental problem. Moreover, benchmarks can also help to diminish the perverse incentives created by regulation itself (the "ratchet effect").

The Commission uses benchmarking in three principal ways: average practice, best practice, and heightened scrutiny for poor performance. The FCC's use of each of these, described briefly below, improves regulatory outcomes and consumer welfare.

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facilities will remain not only a critical regulatory tool, but a public interest obligation.

74 United States v. Western Elec. Co., 993 F.2d 1572, 1580 (D.C. Cir. 1993).

Average practice benchmarking. This form of benchmarking implicates primarily the FCC's obligation to ensure just and reasonable rates. For average practice benchmarking, the Commission uses an industry-wide average as its standard. As explained by Drs. Farrell and Mitchell, the two most important uses of average benchmarking for the FCC's regulation of ILECs are establishing the productivity factor for price cap regulation and setting the appropriate levels of universal service subsidies.

In price cap regulation, the regulated firm's price index must be adjusted annually by any exogenous changes in cost and by the estimated annual rate of productivity gain (the "X-factor"). However, the estimated rate of productivity gain cannot be based on a firm's own past performance because of the "ratchet effect." If the X-factor were based on individual performance, an ILEC would understand that a good performance by it would cause the Commission to raise the X-factor. Anticipating that result, an ILEC would exert less effort to improve its performance than it would if its future prices were independent of its own performance.[75] By instead basing the X-factor on the behavior of numerous comparable ILECs, the FCC can largely avoid this problem. If the X-factor is based on average performance, an ILEC that cuts costs significantly is able to retain a large

75 If price cap regulated entities are certain that extremely poor profit performance will cause regulators to reduce the X-factor, their incentive to provide service inefficiently increases.

portion of the resulting gain, providing an incentive to continue such innovation. Stated another way, average practice benchmarking is beneficial because the regulated entity's incentive to behave inefficiently is ameliorated.

Best practice benchmarking. The Commission relies upon best practice benchmarking to identify the best practice among regulated firms and requires all other firms to implement that practice. The Commission recently acknowledged the utility of best practice benchmarking in *Bell Atlantic-NYNEX* by stating that the existence of numerous large ILECs allows for differences to arise among the carriers, resulting in faster solutions to issues and problems and thereby accelerating competition.[76] As explained by Drs. Farrell and Mitchell:

> By probing the practices of individual ILECs, the Commission endeavors to assess whether ILECs' claims about technical feasibility are warranted . . . . [i]t can then establish as a standard for all ILECs a benchmark based on the best observed (or offered) practice.[77]

If regulated entities were all identical, then they presumably would choose functionally identical practices, thereby negating regulators' ability to employ best practice benchmarking. However, there is often considerable diversity among regulated entities, and they make different choices. As catalogued by Drs. Farrell and Mitchell, the Commission has frequently employed best practice benchmarking to mandate the

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76 *Bell Atlantic-NYNEX* ¶ 154.

77 Farrell and Mitchell at 14.

implementation of the best practice throughout the industry. Examples include critical issues such as technical feasibility of interconnection arrangements, charges for collocation, and OSS development and deployment.

"Worst practice" benchmarking. The FCC engages in "heightened scrutiny for poor performance" (or "worst practice") benchmarking to identify problem cases. This both corrects ILECs' performance after the fact and improves their incentives to perform better in the future. If ILECs understand that regulators will recognize and discipline sub-standard performance, then they have an incentive to ensure that their performance does not fall outside of acceptable norms.

For example, the Commission recently acknowledged the importance of heightened scrutiny benchmarks in discussing the use of Automated Reporting Management Information System ("ARMIS") report data to compare price cap ILECs:

> [B]enchmarking promotes the Commission's uniform reporting goals and is indispensable in monitoring the impact of price cap regulation on ILEC service quality and infrastructure development. . . . "[t]he benefit of benchmarking in price cap ILEC monitoring is that the benchmark is as dynamic as the telecommunications industry."[78]

An ILEC that allows its service quality to degrade in order to extract greater profits from its capped rates would be identified

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78 Amendment of Part 61 of the Commission's Rules to Require Quality of Service Standards in LEC Tariffs, CC Dkt. No. 87-313, *Memorandum Opinion & Order*, 12 FCC Rcd. 8115, ¶¶ 57-58 (1997) (citations omitted).

by comparison to other ILECs and its behavior remedied.[79] Another example, as explained by Drs. Farrell and Mitchell, entailed the FCC's calculation of an industry mean and one standard deviation from the mean to evaluate the appropriateness of physical collocation charges. As explained in the next section, the merger would impair the FCC's ability to exploit this important tool.

B. The Merger Will Substantially Impair The Commission's Ability To Employ Benchmarks For The Regulation Of ILECs.

As the number of large ILECs declines through mergers, the Commission's ability to identify and set benchmarks declines as well, thereby severely hampering the ability of the Commission to effectively and efficiently regulate ILECs. The Commission recognized the impact that mergers have on its regulatory ability in *Bell Atlantic-NYNEX*. In that decision, the Commission noted its concern that the declining number of large ILECs will adversely affect its:

> ability to carry out properly its responsibilities to ensure just and reasonable rates, to constrain market power in the absence of competition, and to ensure the fair development of competition that can lead to deregulation . . . .[80]

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79 See also Peter Huber, The Geodesic Network: 1987 Report on Competition in the Telephone Industry at 3.24, 3.54-3.55 ("Benchmarking one LEC's performance against another in the post-divestiture marketplace has proved an effective regulatory tool. Laggard or eccentric LEC performance stands out when eight large holding companies line up for periodic regulatory inspection").

80 *Bell Atlantic-NYNEX* ¶ 16.

The Commission accordingly held in *Bell Atlantic-NYNEX* that future applicants proposing to merge would bear an additional burden in establishing that a proposed merger is in the public interest.[81]

The Commission's ability to rely upon average practice benchmarking will be diminished by the merger. As Drs. Farrell and Mitchell explain, a price-cap regulated ILEC such as Bell Atlantic retains an incentive to be more productive because, notwithstanding eventual X-factor adjustments, it initially benefits substantially from cost reductions. Put slightly differently, there is a relatively low "tax" on profits generated from cost savings. However, "[a]s a result of the merger, the amount of the 'tax' increases because the effect on the merging partner is internalized."[82] As Drs. Farrell and Mitchell note, "the larger the ILEC, the worse the ratchet effect."[83]

This analysis thus readily predicts that the merger will reduce the incentives of ILECs to increase productivity and this will lead to higher prices. Moreover, the intended use of average practice benchmarking to implement universal service subsidies means that this regulatory policy is also put at risk by the merger.

The effect of the merger on best practice benchmarking is equally troublesome. As the number of ILECs is reduced, the best

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81 Id.

82 Farrell and Mitchell at 40.

83 Id.

observed practice is likely to become worse simply because there are fewer observations. In addition, when ILECs merge, their incentives are aligned so that one may be unwilling to adopt a particular practice knowing that it will be imposed on the other.[84] "This may result in the post-merger incumbent LEC cooperating less than the pre-merger incumbent LECs would have in enabling competition to grow."[85]

For example, GTE and Sprint PCS have entered into an arrangement whereby Sprint PCS customers can roam in regions where GTE's service area overlaps Sprint PCS's service area, but where Sprint PCS has not completed building out its own facilities. GTE receives revenues from this arrangement and GTE's customers can similarly roam on the Sprint PCS network. Bell Atlantic, on the other hand, does not permit Sprint PCS customers to do the same, even though automatic roaming arrangements are standard industry practice and constitute a substantial percentage of cellular carrier revenues. If Bell Atlantic and GTE were to merge, however, Bell Atlantic's practice, which is apparently intended to protect its wireless service areas from competitors, may be adopted by GTE, to the detriment of Sprint PCS. Without the merger, Bell Atlantic may eventually be forced to adopt GTE's practice through best practice benchmarking.

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84 *Bell Atlantic-NYNEX* ¶ 154.

85 Id.

Similarly, Drs. Farrell and Mitchell identify a reduction in the efficacy of worst practice benchmarking. Among other things, they show that fewer observations make it less likely that deviations from the norm will be identified confidently as unreasonable, thereby making regulators willing to tolerate more misconduct than would occur with a larger number of ILECs.

Moreover, as described by Drs. Katz and Salop, because the merger increases the merged entity's incentive to discriminate against rivals, the merger makes the merged entity a less useful benchmark. This is because the merged entity can be expected to offer less competitive access and interconnection arrangements as it internalizes the spillover effects discussed in Section III.

Finally, as described by Drs. Farrell and Mitchell, an ILEC "merger can increase the threat that a common understanding will develop (explicitly or implicitly) not to engage in [actions that are socially desirable and profitable but that harm the interests of other ILECs]."[86] Indeed, as the number of relevant independent firms shrinks to a small few, the probability of such collusion significantly increases.[87] This must be addressed given the reality that the pending consolidation threatens a nation of telephone users served by "Bell East" and "Bell West."

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86 Farrell and Mitchell at 44.

87 Significantly, GTE's and Bell Atlantic's representations in their Application suggest that only very large firms are viable local telephone competitors. If true, this suggests that the reduction in the number of large firms that would result from this merger would make coordinated action by the remaining firms much more likely. This threat is further exacerbated by the proposed merger of SBC and Ameritech.

C. The Commission Must Account For The Effects Of The Proposed Merger On Its Ability To Regulate.

The impairment of regulatory effectiveness through the loss of benchmarks is squarely part of the public interest analysis necessary to this Application's evaluation. Certainly, the Commission anticipated this in *Bell Atlantic-NYNEX* when it held that due to the reduction in the number of independently controlled large ILECs, "future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity."[88]

The diminution in regulatory effectiveness is contrary to the fundamental intent of the 1996 Act: to promote competition, and thereby the ultimate deregulation of telecommunications markets.[89] In light of the competition/deregulation goals of the 1996 Act, the Commission requires applicants to demonstrate that their proposed mergers will affirmatively promote the public interest in <u>both</u> competition and deregulation.[90] Of course, the

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88 *Bell Atlantic-NYNEX* ¶ 16.

89 Joint Explanatory Statement of the Committee of Conference, S. Rep. No. 104-230, at 1 (1996); <u>see also</u> *Bell Atlantic-NYNEX* ¶ 145 ("Increased market power would be fundamentally inconsistent with the primary policy goal of the 1996 Act -- the development of competition in, and the deregulation of, telecommunications markets.").

90 <u>Applications of Teleport Communications Group Inc., and AT&T Corp. for Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services</u>, CC Dkt. No. 98-24, *Memorandum Opinion and Order*, 13 FCC Rcd. 15236, ¶ 12 (1998) ("Teleport/AT&T"); <u>see also</u> *Bell Atlantic-NYNEX* ¶ 2.

two goals are related. Actions and industry structure that are procompetitive will generally improve the ability of regulators to move toward deregulation; anticompetitive steps and structure will increase the need for regulation. This relationship works in the other direction as well; as regulatory effectiveness diminishes, anticompetitive actions by regulated firms are more likely to occur.

The Commission stated in *Bell Atlantic-NYNEX* that,

> [u]ntil competition develops sufficiently to erode market power and permit deregulation, we will be concerned with the impact of proposed mergers on the effectiveness of this Commission's and state commissions' ability to constrain market power and ensure fair rules for competition. A reduction in the number of separately owned firms engaged in similar businesses will likely reduce this Commission's ability to identify, and therefore to contain, market power.[91]

Consequently, the Commission has ample authority to deny the Application on this basis.[92]

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91 *Bell Atlantic-NYNEX* ¶ 147. Moreover, the Commission has recognized that without competition, deregulation cannot be accomplished without risking monopoly prices for consumers. See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Dkt. No. 97-137, *Memorandum Opinion and Order*, 12 FCC Rcd. 20543, ¶ 19 (1997).

92 General Tel. Co. v. United States, 449 F.2d 846, 857 (5th Cir. 1971) ("It is settled that practices which present realistic dangers of competitive restraint are a proper consideration for the Commission in determining the public interest, convenience, and necessity, . . . and the elimination of this danger is consistent with the Commission's broad duties under the Communications Act.")(citations omitted); Cease and Desist Order Directed Against Video Enterprises, Inc., Holyoke and South Hadley, Mass., 52 FCC 2d 630, 637 (1975) (to deny the Commission its right to determine what is in the public interest would be inimical to sound effective regulation).

Moreover, the industry structure that would result from this merger, particularly in tandem with the announced SBC-Ameritech merger, would be dramatically worsened from that considered one year ago in *Bell Atlantic-NYNEX*.[93] At that time, the Commission stated that "further reductions in the number of Bell Companies or comparable incumbent LECs would present serious public interest concerns."[94] As demonstrated above, the merger of Bell Atlantic and GTE raises critical issues regarding the ability of the Commission and state regulators to regulate Bell Atlantic post-merger effectively. If the Bell Atlantic-GTE and SBC-Ameritech mergers are permitted, even fewer benchmarks will be available for the Commission and state regulators to restrain ILEC market power.

Even if one sets aside the anticompetitive consequences of the loss of benchmarks, the costs of alternative forms of regulation that the Commission would be forced to use in the wake of diminished benchmarks would independently compel the conclusion that the merger is contrary to the public interest. In order to fulfill its regulatory duties, the Commission would have to insist on more intrusive and much costlier regulatory oversight of large ILECs. Absent benchmarking, the Commission would have to investigate directly and at substantial cost the actual motivations and/or results of challenged conduct.

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93 See *Bell Atlantic-NYNEX* ¶ 155.

94 Id. ¶ 156.

More direct measures to assess the reasonableness of BOC conduct or positions would need to be implemented. Tools such as increased audits, use of document and *in personae* subpoenas to examine internal decisionmaking, and a vastly stepped-up need for after-the-fact complaint adjudication are just some of the inferior alternative tools the FCC would be forced to adopt. Broad on-the-record hearings to discern anticompetitive conduct from legitimate defenses, reminiscent of the FCC's Docket 19129 of the Bell System, might be necessitated.[95]

The Commission could not of course merely acquiesce in its newfound state of diminished regulatory effectiveness. Just as the Commission cannot regulate where there is no issue to address,[96] and just as it must review regulations periodically to ensure that such regulations are still required,[97] so too must the Commission not fail to regulate where such action is demanded in the public interest.[98] Such a failure would be contrary to the general public interest mandates as well as the Act's specific requirements that the Commission ensure just and

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95 See American Telephone & Telegraph Co., the Associated Bell System Companies Charges for Interstate Telephone Service, AT&T Transmittal Nos. 10989, 11027, 11657, *Phase II Final Decision and Order*, 64 FCC 2d 1 (1977); id., *Phase II Initial Decision*, 64 FCC 2d 131 (1977).

96 See Home Box Office v. FCC, 567 F.2d 9, 34 (D.C. Cir. 1977).

97 See Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979).

98 See generally Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Dkt. No. 20828, *Final Decision*, 77 FCC 2d 384, 433 (1980) ("Commission regulation must be directed at protecting or promoting a statutory purpose.").

reasonable rates and practices. It would also violate the 1996 Act's command that the Commission forbear from its statutory and regulatory obligations only where such forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[99]

Plainly, the radically escalated need for direct regulation would be viewed with great disfavor by regulated firms, but more importantly by taxpayers and their representatives in Congress. The increased regulatory burdens -- keeping in mind that they represent less effective solutions in any event -- dictate the conclusion that the merger is contrary to the public interest.

Finally, the Commission should consider the fact that the decrease in benchmarks will affect the ability of private parties to negotiate favorable conditions with ILECs. Just as the Commission uses benchmarks as regulatory tools to keep firms with market power in check, private parties use benchmarks in their negotiations with ILECs. As a result of the merger, competitors would have less opportunity to exploit the differences among ILECs in this manner, thereby adversely affecting the efficiency of the market and the ability of new entrants to offer competitive services.

The proposed merger between Bell Atlantic and GTE would further reduce the already small number of ILECs regulators can use to establish benchmarks, thereby weakening regulators'

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99 47 U.S.C. § 160(b).

ability to rely upon benchmarks to oversee RBOC and ILEC behavior and impairing their ability to successfully implement the Act.[100] Because Bell Atlantic and GTE have not carried the burden of demonstrating that their merger will be procompetitive and serve the public interest, convenience, and necessity, the Commission must reject the proposed merger.

V. THE APPLICANTS HAVE FAILED TO DESCRIBE HOW THEY INTEND TO COMPLY WITH THE REQUIREMENTS OF SECTION 271.

The Application states that Bell Atlantic "hopes" to have 271 approvals for its states by the time the merger would close.[101] If this "hope" is not realized, the "applicants will request any necessary transitional relief from the Commission."[102] This remarkably truncated treatment of the Bell Atlantic's 271 obligations and restraints is wholly inadequate. Prior to receipt of interLATA authority pursuant to Section 271, no BOC is able to invest in or acquire more than a 10 percent interest in an interexchange carrier in its region. That statutory proscription cannot be waived in any way, "transitionally" or otherwise. Without full divestiture of the forbidden businesses, the transaction is unlawful.

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100 "Reducing the number of Bell Companies makes it easier to coordinate actions among them, and increases the relative weight of each company's actions on average performance." *Bell Atlantic-NYNEX* ¶ 16. In fact, if the SBC-Ameritech merger is approved, there would be even fewer benchmarks available for regulators to use in comparing ILEC behavior.

101 Public Interest Statement at 19 n.14.

102 Id.

Pursuant to Section 271, no BOC or BOC "affiliate" may provide interLATA services, "except as provided in this section."[103] A BOC or BOC affiliate may not provide interLATA services originating in any state within its region until it receives Commission approval pursuant to Section 271(d)(3). The term "affiliate," as defined in Section 3 of the Communications Act, as amended by the 1996 Act, includes "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person," with the term "own" defined to mean "to own an equity interest (or the equivalent thereof) of more than 10 percent."[104] Plainly, GTE and its operating companies would become "affiliates" of Bell Atlantic if the merger were to proceed, and the merged entity is statutorily prohibited from originating any interLATA traffic in any state in Bell Atlantic's region.

Any attempt to shelter the interest in GTE's long distance services originating within Bell Atlantic's region or otherwise "waive" its illegality would necessarily fail under this provision. The Commission has no authority to relax these statutory mandates, as numerous rulings by the FCC acknowledge. Section 10 of the Act, granting the FCC authority to forbear from

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103 47 U.S.C. § 271(a). Section 271(b) allows BOCs and BOC affiliates today to engage in certain categories of interLATA activities, not relevant here. These permitted activities are in any event subject (in most instances) to the structural separation requirements established in Section 272 of the Act, another provision ignored by the applicants.

104 47 U.S.C. § 153(1).

regulating carriers, explicitly prohibits the FCC from forbearing from Sections 251(c) and 271 until those requirements have been fully implemented.[105] The remaining provisions of the Act granting FCC authority are comparably limited by this provision. For example, in the context of construing its forbearance authority under Section 706, the Commission found that Section 10's limitation controls throughout the statute:

> Sections 251(c) and Section 271 are cornerstones of the framework Congress established in the 1996 Act to open local markets to competition. The central importance of these provisions is reflected in the fact that they are the only two provisions that Congress carved out in limiting the Commission's otherwise broad forbearance authority. . . .[106]

It is most ironic that the applicants seek to waive these "centrally important" provisions in the context of a transaction that itself threatens those policies.

Consistent with this precedent, the parties in *SBC-SNET*[107]

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105 See Petition for Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona, 12 FCC Rcd. 4738, 4751 ("The Act expressly prohibits the Commission from abstaining in any way from applying the requirements of Section 271 until those requirements have been fully implemented"); Southwestern Bell Telephone Co. Petition for Limited Modification of LATA Boundaries, 1998 FCC LEXIS 2342, ¶ 5 (rel. May, 1998)("While the Commission may forbear from applying certain provisions of the Act, the Commission may not forbear from the requirements of Section 271").

106 Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Dkt. No. 98-147, *Memorandum Opinion and Order and Notice of Proposed Rulemaking* ¶ 73 (rel. Aug. 7, 1998).

107 Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp., Transferor to SBC Communications, Inc., CC Dkt. No. 98-25, *Memorandum Opinion*

fully divested SNET's long distance businesses within SBC's service areas prior to obtaining FCC approval for the merger. This divestiture was a prominent factor in the FCC's decision, and FCC approval was explicitly conditioned upon

> Applicants' complete and continued fulfillment of the measures described above that are designed to ensure that this merger does not result in SBC providing interLATA services in its current region in violation of Section 271 of the Communications Act. . . .[108]

This conditioned approval was given only after the Commission had been assured of complete divestiture, including: 1) evidence that all of SNET's customers within SBC's territory had been moved to a lawful interexchange carrier of their choice; 2) no current or future compensation would transfer between SNET and the new interexchange carrier; 3) all of SNET's state certificates to provide service in those states had been rescinded by the relevant public utility commissions; 4) all related tariffs had been canceled; and 5) the provision of service by SNET pursuant to calling cards and pre-paid cards had been brought into compliance with Section 271's in-region proscriptions.[109]

The cavalier approach of Bell Atlantic and GTE in this application stands in stark contrast to the regulatory obligations set forth in the statute and Commission precedent. At an absolute minimum the Commission should require the

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and Order (rel. Oct. 23, 1998) ("*SBC-SNET*").

108 Id. ¶ 51.

109 Id. ¶ 37.

applicants to make a supplemental submission to demonstrate in specific detail how they will divest this business to bring themselves into Section 271 compliance prior to any FCC consideration of the merits of the application.

VI. THE CLAIM THAT THE MERGER WILL PERMIT THE MERGED PARTIES TO ENTER 21 OUT-OF-REGION MARKETS IS NOT CREDIBLE OR ENFORCEABLE, AND IT CANNOT IN ANY EVENT COMPENSATE FOR THE ANTICOMPETITIVE EFFECTS OF THE MERGER.

The Commission should approach the applicants' promise of entry into 21 markets out-of-region with great skepticism. The Application does not on its own terms demonstrate its most fundamental assertion: the 21-market strategy is not shown to be merger-specific. As fully analyzed by Drs. Besen, Srinagesh and Woodbury, and supported by the affidavit of Steven Signoff, Vice President, Strategic Business Development, Attachment G, the "follow the anchor customer" premise of the strategy defies commercial realities as well as common sense and does not, in any event, have any substantiated tie with the merger. Contrary to the claims made in the Application, moreover, Drs. Besen, Srinagesh and Woodbury conclude that the merger is likely to result in higher -- not lower -- local prices in the 21 markets. The strategy also necessarily assumes Section 271 authority for the merged entity and thus is highly contingent and unlikely to be implemented within its stated time frame. Finally, even if accepted at face value, the strategy cannot as a matter of law or policy compensate for the in-region anticompetitive effects of the transaction.

A. The Strategy Has Not Been Shown To Be Merger-Specific.

Drs. Besen, Srinagesh and Woodbury fully analyze the claimed benefits of the 21 market strategy in their attached declaration, "Economic Analysis of the Proposed Bell Atlantic-GTE Merger." As demonstrated there, even if one assumes the credibility of the plan, the merger does not appear necessary to its implementation. In a number of critical respects, the assumptions that underlie the assertion that the merger is necessary to implement the 21 market strategy are inconsistent with other assumptions and assertions claimed in the Application.

For example, the parties' claim that they can compete effectively only for customers in their respective service areas is inconsistent with their previous investment in international and cellular divisions out-of-region. Bell Atlantic has cellular properties in Arizona, Georgia, and New Mexico, far from its in-region markets. Through its PrimeCo PCS partnership with U S WEST, Inc. and AirTouch Communications, Bell Atlantic also provides cellular service in numerous out-of-region areas, including Alabama, Florida, Illinois, Indiana, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, Texas, and Wisconsin. GTE also provides cellular out-of-region in Tennessee. Internationally, the applicants have holdings in cellular companies, and in landline companies in Canada, India, New Zealand, the Philippines, Thailand, and Venezuela, among other distant countries.[110] In light of these successful

[110] Application at Exhibit A.2 (map of Bell Atlantic and GTE

ventures, neither Bell Atlantic nor GTE can credibly claim that it lacks the resources, name brand, or expertise to compete out-of-region.

As demonstrated below, the merger is not needed to obtain the benefits that are claimed by the applicants.

1. GTE Can Expand Without The Merger.

At bottom, GTE argues that it cannot provide service and compete for business outside its region without first merging with Bell Atlantic and obtaining Bell Atlantic's large business customer accounts and financial resources. GTE presents four explanations to justify why it is unable to enter out-of-region: (1) substantial fixed, up-front investments are required; (2) economical entry requires proximate facilities, which cannot be economically deployed without larger scale and more customers; (3) acquiring customers is difficult without a base of anchor customers; and (4) GTE needs a national brand and brand name awareness it can only attain by merging with Bell Atlantic.[111] Each of these four justifications rings hollow, especially in light of the empirical evidence that CLECs smaller than GTE are entering on precisely the basis that GTE claims it cannot without the resources of Bell Atlantic. As discussed below and in the attached declaration of Besen, Srinagesh and Woodbury, GTE cannot credibly claim that a merger with Bell Atlantic is a prerequisite to out-of-region entry.

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worldwide assets); see also Besen, Srinagesh and Woodbury at 39.

111 See Public Interest Statement at 7.

As an initial matter, GTE's claim that it needs Bell Atlantic is contrary to its own actions. Prior to its decision to merge with Bell Atlantic, GTE engaged in ongoing, extensive efforts to become a nationwide competitive local exchange carrier.[112] GTE apparently already provides competitive local exchange services in 8 of the 12 states identified by the applicants in their 21 market strategy (California,[113] Florida, Illinois, Indiana, Kentucky, Tennessee, Texas, Washington).[114] GTE is licensed as a CLEC in the remaining four states (Michigan, North Carolina, Ohio and Oregon). Although GTECC primarily competes on a resale basis, there is no particular reason that GTE could not enter on a facilities basis.

As analyzed in the Besen, Srinagesh and Woodbury declaration, GTE's "claims should be afforded little, if any credibility."[115]

> [T]here would appear to be nothing to prevent GTE from seeking to serve the needs of businesses that are located in Bell Atlantic's service territory but that have operations in or near GTE's service territory.

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112 1997 GTE Annual Report at 5 (describing formation of GTECC in order to enable GTE to realize its goal of becoming a nationwide provider of telecommunications and data service). See generally discussion at Section II, supra.

113 GTE recently installed a switch at the University of Southern California, in SBC's local service area, in order to provide local exchange and exchange access service to the university. This is precisely the type of competitive expansion GTE now argues it is unable to implement alone.

114 See Virginia Application ¶ 9. It is not clear whether in some states GTECC is reselling services of the GTE ILEC, or whether it provides services outside its ILEC's service area, or both.

115 Besen, Srinagesh and Woodbury at 35.

> Indeed, if GTE's services are as attractive as they are claimed to be, GTE could compete effectively . . . even within Bell Atlantic's service territory. By using a combination of its own and leased facilities, GTE can extend its within-region expertise to compete for large business customers in Bell Atlantic's service area. . . . There is no sense in which Bell Atlantic's large business customers are an "essential facility" for GTE because GTE can win those customers from Bell Atlantic.
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> Further, GTE currently possesses a significant competitive advantage in competing for businesses in Bell Atlantic's service territory that would likely be lost, at least for a time, if the merger were to take place.[116]

In short, the competitive benefits that the merging parties claim for the merger can be largely or completely attained by GTE acting alone.

Further, as the Commission is well aware, other CLECs are entering local markets across the country without the benefit of a preexisting group of large customers. Small, start-up enterprises lacking significant capital for up-front investments, proximate facilities, a base of anchor customers, or a national brand name are nevertheless entering through a combination of independent facilities and access to ILEC facilities. Nonetheless, GTE argues it cannot enter unless it is permitted to merge with Bell Atlantic.

The suggestion that GTE cannot enter without access to Bell Atlantic's "anchor customers" is particularly suspect. Large business customers are sophisticated, and there is no reason to believe that GTE would have a competitive handicap, *vis-a-vis* other CLECs, in pursuing large businesses outside GTE's in-region

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116 *Id.* at 36.

service area.[117] Indeed, GTE is better situated than other CLECs due to its size, its experience in local exchange markets, and its current ability to bundle local with long distance and data services.

As recently as February 1998, just months prior to its July 1998 merger announcement, GTE boasted of its aggressive efforts to become a national out-of-region player in the local exchange markets. Furthermore, GTE sought expedited state regulatory approvals so it could speed new services to out-of-region customers it did not yet serve. In addition, GTE has aggressively pursued its CLEC strategy by spending significant amounts on a national advertising campaign to support such CLEC entry.[118] Less than five months later, however, and concurrent with its July 1998 merger announcement, GTE would have the Commission believe that everything has changed and that it can no longer enter without first merging with Bell Atlantic. While it is to be expected that GTE would recast its actions in order to gain the FCC's approval of this merger, it is impossible to believe the Commission would be fooled by such a ploy.

2. Bell Atlantic Can Expand Without The Merger.

The applicants similarly argue that Bell Atlantic cannot follow its "legion of anchor customers" into GTE's service areas without the merger: "Bell Atlantic cannot reach these customers alone because it lacks the facilities, platform capability, and

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117 Affidavit of Steven Signoff ¶¶ 17-25, Attachment G ("Signoff").

118 See supra discussion at Section II.D.

marketing and distribution channels required to reach so far beyond its concentrated franchise."[119] While Bell Atlantic may not have existing facilities in the 21 markets, none of the identified barriers, separately or in combination, has the effect of precluding Bell Atlantic from pursuing its "anchor customers" out-of-region without GTE.[120]

In support of their Application, the parties claim that Bell Atlantic's brand lacks sufficient national weight to warrant pursuing the 21 market strategy alone.[121] Contrary to these claims, Bell Atlantic, as the incumbent local exchange provider, clearly has name brand recognition with these "anchor customers," who are, by definition, in-region companies. Moreover, as discussed above, the large users that are the initial targets of the strategy are sophisticated users who are certainly familiar with the name of Bell Atlantic.[122] Further, this exercise in modesty over Bell Atlantic's brand name belies reality. Bell Atlantic spent over $580 million -- more than any other telecommunications company, with the exception of AT&T -- on national advertising last year.[123] Nor does Bell Atlantic need

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119 Kissell ¶ 8.

120 See Besen, Srinagesh and Woodbury at 32-33, 37-39.

121 Kissell ¶ 11.

122 See Signoff ¶ 23.

123 See Kissell ¶ 5.

GTE for its expertise. Bell Atlantic has extensive technical capabilities and expertise in offering local exchange service.[124]

The parties also fail to explain how other CLECs can successfully market their products to large customers, while Bell Atlantic and GTE cannot. Bell Atlantic concedes that other CLECs, including "MFS, Winstar, TCG and many others," have successfully begun to enter out-of-region using some combination of resale, UNEs, and facilities-based options.[125] In spite of this fact, the applicants ignore these strategies when assessing Bell Atlantic's ability to follow its "anchor customers" out-of-region. Indeed, if other CLECs -- with fewer financial resources and facilities, and no regional (let alone national) name brand -- can enter and compete against the incumbent carrier, it is inconceivable that Bell Atlantic -- with more financial resources, more experience offering local service, and a strong (regional if not national) brand name -- would be unable to implement an out-of-region strategy without GTE. This argument essentially boils down to a claim that a carrier, even one with extensive experience offering local service in-region, cannot compete in out-of-region, non-contiguous markets unless that carrier merges with the incumbent monopoly LEC in or adjacent to the targeted market.[126] Such an argument is an anathema to the

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124 See id. ¶ 11.

125 Stallard ¶¶ 12, 18.

126 Besen, Srinagesh and Woodbury at 31-32.

procompetitive goals of the Act and contrary to the evidence regarding CLEC entry.[127]

Finally, the parties claim that "[t]he merger will therefore give the combined company the scale and traffic volume necessary to support a national long distance network."[128] First, the long distance market is competitive, so any arguable increment to long distance competition is readily eclipsed by the entrenchment the merger would cause for local markets. Second, because of the effects of Section 271, the merger would actually remove GTE as a long distance provider in Pennsylvania and Virginia, and as discussed infra, Section 271 approval for Bell Atlantic's in-region states is not likely any time soon. Third, GTE appears to concede that it will not be contributing any "anchor customers" to this critical mass.

It should be noted that this rationale is different from that offered by SBC-Ameritech in support of their merger. SBC-Ameritech instead claimed that each had an insufficient number of large business customers to warrant "following" those customers to new regions. Here, GTE claims that Bell Atlantic could not follow its anchor customers to GTE's regions because Bell Atlantic lacks nearby facilities.

Drs. Besen, Srinagesh and Woodbury have also taken issue with SBC-Ameritech's "follow the customer" strategy. See

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127 See, e.g., Trends in Telephone Service, *Report*, 1998 FCC LEXIS 3511, at Table 8.1 (rel. July 16, 1998) (quantifying extent of CLEC entry between 1993-97).

128 Declaration of Debra Covey ¶ 2.

Declaration of S. M. Besen, P. Srinagesh, and J. R. Woodbury, "An Economic Analysis of the Proposed SBC-Ameritech Merger," Oct. 14, 1998. However, as noted in the attached declaration, "at least there the merging parties do not contend that they must merge with the ILECs in the regions they plan to enter for their strategy to be successful."[129] This alone indicates that Bell Atlantic could pursue its customers out-of-region without GTE. While GTE's existing facilities might be used by Bell Atlantic to serve these customers, the merger is not necessary for that to occur. Without evidence that the merger is required to achieve such efficiency, the applicants cannot meet their burden of demonstrating that the public interest will be served by the merger.

B. By Its Terms, The Strategy Requires Section 271 Authority Throughout The Bell Atlantic States And Thus Will Not Be Implemented Within The Asserted Time Frame.

Bell Atlantic asserts that it plans to enter, by relying on GTE's proximate facilities, 21 out-of-region markets to provide a bundle of telecommunications services to its anchor customers within 18 months of closing.[130] Because the Application describes the need to first follow the largest customers who then become "anchor customers" and a base for smaller business and residential users, the internal logic of the schedule suggests near-immediate commencement of business service offerings.

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129 Besen, Srinagesh and Woodbury at 38.

130 Public Interest Statement at 6-8.

What the applicants omit here is the critical fact that the plan requires Bell Atlantic to obtain Section 271 authority in its in-region states in order to succeed on its own terms, and thus necessarily assumes that Section 271 authorization will be granted in those states within this 18 month time period. This is because the 21 market "follow the anchor customer" plan hinges upon satisfying the majority of those customers' telecommunications needs. Until Bell Atlantic obtains 271 authority, it will not be able to handle any interLATA calls from its existing, in-region anchor customers to out-of-region destinations, or to in-region, interLATA destinations. Given the remoteness of Section 271 compliance for Bell Atlantic throughout its states, the plan necessarily fails on this ground as well.

Bell Atlantic is nowhere near ready for 271 authority. A review of the status of 271 proceedings in its states is revealing on this point. None of these states has found that Bell Atlantic is in compliance with the full set of 271 requirements.[131] New York provides the definitive example of

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131 See, e.g., Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions and Draft Filing of Petition for InterLATA Entry, NYPSC Case 97-C-0271, *Ruling Concerning the Status of the Record* 1 (July 8, 1997); To Determine Prices Bell Atlantic-Virginia, Inc. is Authorized to Charge Competitive Local Exchange Carriers in Accordance with the Telecommunications Act of 1996 and Applicable State Law, Case No. PUC 970005, *Order* (Va. Corp. Comm'n Nov. 19, 1998) (additional filings in this pricing docket due December 11, 1998); Bell Atlantic-Pennsylvania's Entry into In-Region InterLATA Services Under Section 271 of the Federal Telecommunications Act of 1996, Docket No. M-00960840, *Opinion and Order* (Pa. Pub. Util. Comm'n May 12, 1998); "Bell Atlantic Moves to Enter Long Distance Market in New Jersey; Proposes Measures

just how far Bell Atlantic is from gaining regulatory approval. Following hearings and her review of thousands of pages of evidence, a NYPSC Administrative Law Judge found that Bell Atlantic-New York had not met its burden of proof with respect to its Section 271 Prefiling Statement, and noted the difficulty in obtaining services and elements in a timely manner and clear lack of OSS parity. The same judge also recently found "as a matter of fact on this record" that none of BA-NY's proposed UNE combination methods constitutes a nondiscriminatory form of obtaining and combining unbundled elements.[132] In addition, an independent consultant tasked with analyzing Bell Atlantic's OSS platform has yet to issue any determination. Finally, significant issues remain pending before the Supreme Court pursuant to its review of the 8th Circuit's Iowa Utilities Board decision. This makes the 21 market strategy, contingent as it is on 271 authority, even more uncertain and remote.

C. Even If Accepted At Face Value, The Strategy To 'Jump-Start' Competition Out-Of-Region Cannot As A Matter Of Law Or Policy Override The Anticompetitive Effects Of The Merger In-Region.

Even if the Commission were to accept everything the parties have promised as true, the 21 market strategy would still not overcome the plainly anticompetitive effects of the merger in other

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to Hasten Local Competition," PR News Wire via Dow Jones, Nov. 16, 1998.

132 Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements, NYPSC Case 98-C-0690, *Proposed Findings of Administrative Law Judge Eleanor Stein* at 10 (Aug. 4, 1998).

markets, e.g., interLATA services, in-region local telecommunications markets, and new services. The applicants are thus simply wrong in asserting the "substantial pro-competitive benefits [of the merger] will far outweigh any minimal loss in potential competition inside the Bell Atlantic region."[133] Under a traditional competitive analysis, as required by the Clayton Act, alleged procompetitive benefits in one set of markets cannot be used to justify a merger that would have predictable anticompetitive effects in other markets. The public interest may be a more flexible standard, but it nevertheless will not tolerate consumer welfare being diminished in one market to supposedly improve it in another.

The Clayton Act prohibits mergers that lessen competition "in any line of commerce or in any activity affecting commerce in any section of the country."[134] The courts have consistently interpreted this language as meaning that an acquisition is unlawful if it has anticompetitive effects in any line of commerce in any section of the country. For example, the merging parties in United States v. Bethlehem Steel[135] admitted that their merger would reduce competition in certain areas of the country.[136] In defense of the merger, the parties insisted that

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133 Public Interest Statement at 2. Of course, the competitive losses occur both inside and outside the Bell Atlantic region, as the preceding sections demonstrate.

134 15 U.S.C. § 18.

135 168 F. Supp. 576 (S.D.N.Y. 1958).

136 Note, they argued that this decrease would not

the total steel production capacity of the resulting company would expand and stimulate competition both in current and new markets.[137] Further, they argued that the merger would allow Bethlehem Steel to challenge the dominant position of the U.S. Steel Corporation. The court rejected these arguments:

> The simple test under § 7 is whether or not the merger may substantially lessen competition "in any line of commerce . . . in any section of the country." A merger may have a different impact in different markets -- but if the proscribed effect is visited on one or more relevant markets then it matters not what the claimed benefits may be elsewhere.[138]

In United States v. Philadelphia Bank,[139] the Supreme Court specifically rejected the argument that anticompetitive effects in one market can be justified by procompetitive benefits in another.[140] The banks contended that the proposed merger would increase the resulting bank's lending limit and thereby enable it to compete with large out-of-state banks, particularly New York banks, for very large loans. The court held that this defense would lead to an absurd conclusion:

> If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader. For if all the commercial banks in the Philadelphia area merged into one, it would [still] be smaller than the largest bank

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"substantially" reduce competition in these areas.

137 Id. at 581.

138 Id. at 618.

139 374 U.S. 321 (1963).

140 Id. at 370.

> in New York City. This is not a case, plainly, where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that market.[141]

The courts and antitrust policymakers reject the multi-market balancing approach because it would force them to favor one group of consumers (those in the new market) over another group of consumers (those in the target market). In both Bethlehem Steel and Philadelphia Bank the merger proponents argued that, viewed as a whole, their respective mergers would result in net welfare gains to society. The Bethlehem Steel court specifically rejected this form of selective favoritism.

> Any alleged benefit to the steel consumer in the Chicago district because of reduced freight charges and an increased supply, cannot, under the law, be bought at the expense of other consumers of numerous other steel products where the effects of the merger violate the Act.[142]

Areeda and Turner conclude that the defense of an otherwise anticompetitive merger with a multi-market balancing approach has been rejected for a broad policy reason:

> [T]o balance gains in one market against potential losses in another would necessarily favor one group of consumers over another . . .[143]

Bell Atlantic and GTE argue that the purported actual benefits to competition resulting from their merger should outweigh any possible anticompetitive harms caused by eliminating

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141 Id. at 370-371.

142 Bethlehem Steel, 168 F. Supp. at 618.

143 Areeda, Hovenkamp, & Solow, 4A Antitrust Law ¶ 972(a) (rev. ed. 1998).

a potential competitor in the Bell Atlantic markets.[144] The argument that increases in actual competition resulting from Bell Atlantic-GTE's entry in 21 new markets should outweigh the anticompetitive effects due to a loss of potential competition in other markets is not supported by the case law or theory. When competitive benefits occur in the same market where a potential competitor is eliminated, the negative and positive effects can be weighed against one another to determine the net effect in the relevant market. Where the effects are experienced in distinct markets, as here, policymakers would be forced to choose the importance of competition in one market over another. Bell Atlantic and GTE are essentially asking the Commission to choose (ostensibly) competitive entry outside of the merged entity's region at the expense of foreclosing competitive entry in-region. Plainly, consumers in Philadelphia are entitled to the benefits of local telephone competition as much as consumers in Portland, Oregon.

While the Communications Act grants the FCC more flexible decisionmaking authority than the FCC would have when it is constrained by the language of the Clayton Act, the public interest test requires the same conclusion here. It is hornbook law that the public interest standard is a broad, flexible standard, encompassing the "broad aims of the Communications

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[144] Public Interest Statement at 2.

Act."[145] This breadth of discretion does not allow the FCC to ignore actual anticompetitive effects, however.

The public interest standard of course requires consideration of the effect of the transfer on competition,[146] although the impact on competition is one of many issues the FCC may consider when deciding whether a given merger would be in the public interest:[147]

> Our examination of a proposed merger under the public interest standard includes consideration of the competition policies underlying the Sherman and Clayton Acts . . . but the public interest standard necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws.[148]

FCC concerns other than competition include, but are not limited to: deregulation policy, universal service, and technological innovation.[149]

The traditional articulation of the public interest standard and the relevance of competition analysis has changed dramatically over time. Legal scholars recognize that competition may be only one consideration among many in the FCC's

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145 *Bell Atlantic-NYNEX* ¶ 2 (quoting Western Union Div., Commercial Telegrapher's Union v. United States, 87 F. Supp. 324, 335 (D.D.C. 1949), aff'd, 338 U.S. 864 (1949)).

146 Craig O. McCaw & AT&T For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. & its Subsidiaries, FCC 94-238, *Memorandum Opinion and Order*, 9 FCC Rcd. 5836, ¶ 9 (1994), recon. denied, 10 FCC Rcd. 11786 (1995), aff'd, SBC Communications Inc. v. FCC, 5 F.3d 1484 (D.C. Cir. 1995) ("*AT&T-McCaw*").

147 United States v. FCC, 652 F.2d 72, 96 (D.C. Cir. 1980).

148 *Bell Atlantic-NYNEX* ¶ 2.

149 Id.

calculus, but conclude that it has become an increasingly important consideration.[150] Indeed, in the context of its Title II duties, the statutory context that defines the parameters of the public interest standard has changed dramatically from the original Act. Congress at one time presumed that telecommunications services subject to the Act would have to be provided on a monopoly basis, and generally accepted that competition would be "wasteful" or "ruinous." Subsequently, the Commission struggled to reinterpret the public interest as it became aware that at least some of these assumptions were inaccurate, or at least were worth testing.[151] The Act, as amended by the 1996 Act, has now brought this learning into the statute: Congress has declared that competition should be presumed possible -- indeed it compels that substantial steps be undertaken to bring about competition. Thus, a traditional public interest calculus, leaving competition as just one factor among many to be considered, does not capture the current law as prescribed by Congress.[152]

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150 Friedrich, Jason E., 6 Commlaw Conspectus 261, 266 (1998).

151 See FCC v. RCA, 346 U.S. 86, 93 (1953); All Am. Cables & Radio v. FCC, 736 F.2d 752, 755 (D.C. Cir. 1984);); Computer & Communications Indus. Ass'n, 693 F.2d 198, 217 (D.C. Cir. 1983); Telocator Network of Am. v. FCC, 691 F.2d 525, 544 (D.C. Cir. 1982); Hawaiian Tel. Co. v. FCC, 498 F.2d 771, 775-76 (D.C. Cir. 1974).

152 The competition element within the public interest standard is harder to satisfy than the Clayton Act. "In order to find that a merger is in the public interest, we must, for example, be convinced that it will enhance competition." *Bell Atlantic-NYNEX* ¶ 2 (emphasis added).

Research discloses no case in which the FCC opted to promote competition in one market at the expense of diminishing competition in another.[153] Whether under the new public interest standard as derived from the 1996 Act or a more traditional articulation, the FCC has never forced itself to select one set of consumers over another. Bell Atlantic's and GTE's invitation to do so should be summarily denied.

In *Bell Atlantic-NYNEX*, the FCC concluded that the merger, on its face, would have anticompetitive effects:

> taking the merger on its terms alone and without any other considerations, we believe that Applicants have failed to carry their burden of showing, under the public interest standard, that entry would be sufficiently easy to mitigate the potential harms to competition from merging the leading and no less than fifth most significant participant in the market for providing telecommunications services to residential and small business customers.[154]

Despite these anticompetitive consequences, the FCC permitted the merger provided the parties adhered to certain conditions:

> We believe these conditions create pro-competitive benefits that at least in part mitigate the potentially negative impacts of the proposed merger on competition in LATA 132 and the New York metropolitan area, and that, when extended through the Bell Atlantic and NYNEX regions, outweigh any other adverse effects in those areas. These conditions will make it more likely that

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153 See, e.g., *AT&T/McCaw*, 9 FCC Rcd. 5836 (1994), recon. denied, 10 FCC Rcd. 11786 (1995), aff'd, SBC Comm. v. FCC, 5 F.3d 1484 (D.C. Cir. 1995) (FCC found that the merger would not impose any anticompetitive effects but nonetheless required the merging parties to agree to certain equal access provisions); United States v. FCC, 652 F.2d 72, 106 (D.C. Cir. 1980) (upholding FCC grant to SBS to operate three domestic satellites, finding that FCC reasonably concluded that entry by SBS into satellite communications service would not be anticompetitive).

154 *Bell Atlantic-NYNEX* ¶ 12.

> other market participants can enter, expand or become more significant market participants that are capable of mitigating in the relevant market, the competitive harms that we otherwise foresee as likely resulting from the elimination of Bell Atlantic as a likely independent market participant.[155]

While the FCC did give consideration to the fact that the procompetitive effects would extend into geographic markets beyond those in which the anticompetitive effects would occur, it also found the procompetitive promises made and conditions imposed offset the anticompetitive harms within the same geographical markets that suffered the predicted competitive harms. Bell Atlantic and GTE, on the other hand, propose to offset the anticompetitive harms in one market with procompetitive gains in another. As demonstrated, neither the Clayton Act nor the Communications Act permits such a rationale.

* * * *

The foregoing shows that the 21 market strategy is not merger-specific, it is not credible, and it is not relevant under the appropriate legal and policy tests. Even if all of this could somehow be overcome, there remains the fundamental problem of how the promise to enter 21 markets could ever be enforced by the Commission. What if, as has certainly happened with other companies in similar situations, business strategies are altered after the merger?[156] It is implausible that the Commission could

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155 Id. ¶ 14.

156 Similar promises were made to regulators by SBC in the context of its acquisition of Pacific Telesis and its video businesses. These businesses were shut down soon after the

actually hold Bell Atlantic and GTE to their promises: how could the government successfully command private firms to enter markets and compete?

Perhaps the most disconcerting aspect of the 21 market strategy claim is its implicit vision of the scale needed to compete -- a vision directly contrary to the goals underpinning the 1996 Act and contrary to evidence of CLEC market entry. To accept Bell Atlantic's and GTE's views, the Commission would have to conclude that there is room for no more than two extraordinarily large local telephone companies in the U.S. telecommunications marketplace.

Competitive entry at the local level is beginning to occur;[157] this potential should be vigorously pursued rather than abandoned to the megamerger requests now pending before the FCC. Contrary to Congress' vision, the Commission's efforts, and the marketplace reality of CLEC entry, Bell Atlantic and GTE have cynically concluded that competition should be replaced with consolidation. On this ground alone, the 21 market strategy and the Application should be rejected.

VII. OTHER CLAIMED EFFICIENCIES ARE NOT SUPPORTED.

The other claimed efficiencies of the merger are at best unsupported and, in practice, unlikely to be realized. The Application identifies essentially three additional efficiencies

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transaction was consummated.

157 See Trends in Telephone Service, *Report*, 1998 FCC LEXIS 3511 at Table 8.1 (rel. July 16, 1998) (measuring average annual growth of CAPs and CLECs from 1993-96).

purported to be achieved by the proposed merger: (1) cost savings, (2) revenue enhancements, and (3) diffusion of best practices. However, the Application offers no evidence, and thus no confirmation, of the potential for these efficiencies. Indeed, considered inquiry suggests that the efficiencies may be realized without a merger or, alternatively, would not, in fact, be achieved by the proposed transaction. These are each discussed briefly below, and more fully examined in the declaration by Drs. Besen, Srinagesh and Woodbury.[158]

Cost Reductions. The Commission has placed the burden to prove claimed cost efficiencies on the parties to a merger.[159] The Commission specifically stated that "Applicants bear the burden of proving that the asserted efficiencies are not another form of reducing output . . . "[160] This burden has been ignored here; the parties simply assert that the merger will produce $2 billion in cost savings due to "eliminating duplicative staff and information and operation systems, more efficiently using long-distance capacity, and reducing procurement costs."[161] Bell Atlantic argues that these savings are "real budget commitments that department heads must meet or exceed."[162] According to the

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158 Besen, Srinagesh and Woodbury at 46-50.

159 See *Bell Atlantic-NYNEX* ¶¶ 168-71.

160 See id. ¶ 171.

161 Application at Exhibit A.4, Declaration of Doreen Toben ¶ 3 ("Toben").

162 Toben ¶ 4. Another $.5 billion in capital expenditure cuts are asserted. Id. ¶ 2.

parties, because a corporate officer's compensation will be based upon whether he achieves the set budget commitments, the targeted amount will be met.[163] No other support for this claimed $2 billion savings is provided, and thus the applicants have not satisfied their burden of proof.

As noted in the attached declaration, "[r]ecent econometric studies on the economies of scope and scale in local telecommunications networks do not support the claim that mergers of firms serving non-overlapping territories would result in cost savings."[164] Except in certain limited locations, Bell Atlantic and GTE serve disjointed territories and do not own duplicative and redundant facilities. These facts alone largely refute the parties' assertion that the merger will result in the claimed savings. Indeed, consolidation may actually reduce net public benefits by raising costs and resulting in inefficient behavior by the merged entity.[165]

Revenue Enhancements. The applicants project approximately $2 billion in increased revenue synergies as a result of the merger.[166] These projected "enhancements will come from the . . . penetration of vertical services like second lines;

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163 Id.

164 Besen, Srinagesh and Woodbury at 46-47.

165 Id. at 47 ("'Using recent 1984-91 data, [Ying and Shin] f[ou]nd that LECs are not natural monopolies in the post-divestiture era. Having two firms produce the monopoly output could potentially result in over 20 percent cost savings.'") (citation omitted).

166 Toben ¶ 2.

improving the value and speeding the widespread deployment of long-distance offerings; and creating better and more widely distributed data services."[167] Like cost savings, these synergies are claimed to be "real budget commitments" by department heads.[168]

Even if one were to assume that such enhancement projections are reasonable, the Application fails to present sufficient evidence to conclude that post-merger revenue growth is attributable to the merger, rather than to general market trends existing outside the context of the merger such as independent growth in demand for the identified services.[169] Without sufficient evidentiary support, there is no reason to assume that post-merger revenue growth is indicative of merger-related public benefits. Indeed, the contrary conclusion is equally plausible because the merger may provide the merged entity an increased ability to engage in anticompetitive practices.

Even if increased revenues to the merged firm were directly tied to the public interest (by demonstrably serving ratepayers, not shareholders), each source of enhancement should be independently viewed with caution.[170] For example, the claim

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167 Id. ¶ 3.

168 Id. ¶ 4.

169 See supra n.159 and accompanying discussion (citing *Bell Atlantic-NYNEX* ¶¶ 168-71).

170 It bears noting that Ms. Toben has underscored her company's commitment to "Wall Street analysts and their investors" rather than its regulatory obligations. Toben ¶ 4.

that the merger will allow more rapid deployment of better long distance and advanced data services is questionable. To the extent that these advantages arise from GTE receiving "better" (as opposed to equal) access to Bell Atlantic's customers, such access would unfairly disadvantage competitors and competition and cannot be counted as public interest benefits.[171]

In an attempt to document analogous synergies elsewhere, the parties rely on alleged cost savings and revenue enhancements from the merger of Bell Atlantic's wireless operations with NYNEX's cellular properties and the recent Bell Atlantic-NYNEX merger.[172] This evidence consists of the observation that per-subscriber costs for cellular customers have fallen, and that the estimated merger-related gains for Bell Atlantic-NYNEX "are being achieved."[173] However, these statements are "not sufficient to demonstrate either the magnitude of any gains attained subsequent to the merger or that the gains were merger-related."[174]

Best practices. The parties also argue that the combined carrier will benefit from adoption of the best practices of each firm.[175] Taken at face value, Bell Atlantic's and GTE's contention that they had no intention of competing with one another suggests that the diffusion of best practices could occur

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171 Besen, Srinagesh and Woodbury at 48-49.

172 Toben ¶¶ 6-7.

173 Id. ¶ 7.

174 Besen, Srinagesh and Woodbury at 50.

175 Public Interest Statement at 22.

without a merger (e.g., contractually exchanging best practice technology).[176] Indeed, the diffusion of best practices and the purportedly concomitant lowered costs appear more likely absent a merger. Indeed, as discussed above, the merger may actually diminish the firms' incentives to adopt one another's efficiency-generating practices due to benchmarking considerations.

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The absence of any support (empirical or other) for the asserted merger efficiencies and the logically predictable net public welfare and efficiency losses strongly counsel against approval of the Application on these bases. As noted, some claims (e.g., purported economies of scale) are inconsistent with recent econometric studies. Other claims (e.g., increased vertical services' revenue) are equally questionable. In short, Bell Atlantic and GTE have failed to credibly establish that the merger will generate some $4.5 billion in efficiencies within three years of closing.

VIII. POST-MERGER CONDITIONS HAVE NOT BEEN EFFECTIVE AND THUS CANNOT BE RELIED UPON TO DIMINISH THE ADVERSE COMPETITIVE EFFECTS.

As demonstrated, the anticompetitive consequences of allowing the merger are unambiguous. The Commission should not content itself with allowing the merger and relying on conduct regulation after the fact. Professors Krattenmaker and Salop, two of the originators and proponents of the "raising rivals'

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176 Besen, Srinagesh and Woodbury at 47.

costs" non-price predation theory, have noted its applicability to merger policy.[177] Further, the Commission's statutory mandate extends well beyond merely correcting bad conduct to assuring efficient industry structures which themselves will aid to minimize such misconduct.[178]

Conditions have not been sufficient to date. The *Bell Atlantic-NYNEX* Order set forth multiple conditions subsequent to Bell Atlantic's last acquisition of local monopolies. The conditions became effective upon release of *Bell Atlantic-NYNEX* or shortly thereafter, with all obligations scheduled to sunset in 48 months. These conditions relate to performance standards and associated remedies, performance monitoring reports, Operations Support Systems, and pricing. Within the first few months, however, it became apparent that Bell Atlantic would marshall its efforts in order to evade those requirements or to stall required negotiations with competitors. Accordingly, competitors were forced to file Section 208 complaints seeking relief from the Commission and pursue other remedies before state commissions.

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177 See Thomas G. Krattenmaker, Steven C. Salop, "Analyzing Anticompetitive Exclusion," 56 Antitrust L. J. 71, 81-82 (1987). Similarly, in an extensive note on the Cargill case, one commentator has suggested that a merger enabling a firm to predate by raising the price of a rivals' input could satisfy the Cargill standard. Thomas F. Cotter, "Note: Cargill, Inc. v. Monfort of Colorado, Inc., The Supreme Court Restricts Private Antitrust Challenges to Horizontal Mergers," 1987 Wisc. L. Rev. 503, 530-31 (1987).

178 See GTE Serv. Corp. v. FCC, 474 F.2d 724, 730 (2d Cir. 1973); GTE of the Southwest v. FCC, 449 F.2d 846, 853-856 (5th Cir. 1971).

In late 1997, AT&T and MCI each filed a complaint alleging that Bell Atlantic refused to price in accordance with *Bell Atlantic-NYNEX* conditions.[179] AT&T complained that "[i]n none of [its seven pre-merger][180] jurisdictions has Bell Atlantic offered competing LECs access to network elements and interconnection at truly TELRIC-based rates."[181] Rather, Bell Atlantic interpreted the Commission's TELRIC standard to permit Bell Atlantic to recover its "actual" costs -- including embedded costs. Furthermore, AT&T demonstrated that "Bell Atlantic's obligations regarding this forward-looking cost standard applied to existing offerings, not just those that post-dated the Commission's Merger Order."[182] For its part, Bell Atlantic has ignored the thrust of *Bell Atlantic-NYNEX*, which contemplates that all competitors will benefit from prices established at costs (see *Bell Atlantic-NYNEX* ¶ 200) including the condition #9 attached thereto, and has argued that only post-merger prices need be based upon forward-looking costs, and that pre-merger prices are not affected by the

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179 See *MCI Complaint*, MCI Telecomm. & MCImetro Access Transmissions Serv., Inc., File No. E-98-12 (FCC, filed Dec. 19, 1997) ("1997 MCI Complaint"); *AT&T Complaint*, AT&T Corp. v. Bell Atl. Corp., File No. E-98-05 (FCC, filed Nov. 5, 1997) ("AT&T Complaint"). These complaints, by their own terms, only apply to the former Bell Atlantic states. See AT&T Complaint n.1; 1997 MCI Complaint n.1.

180 Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia.

181 AT&T Complaint ¶ 21.

182 Id. ¶ 4 (citing *Bell Atlantic-NYNEX* ¶ 185 -- "Bell Atlantic-NYNEX must, irrespective of whether either Bell Atlantic or NYNEX has a prior agreement with a competing carrier, offer

terms of *Bell Atlantic-NYNEX*.[183] The 1997 MCI Complaint echoed the problems identified in AT&T's complaint, using Bell Atlantic's proposals before the Pennsylvania PUC as a proxy for Bell Atlantic's activities before each of its respective state commissions.

MCI filed a subsequent complaint in March 1998[184] that alleged that Bell Atlantic again violated the merger conditions by "refusing to negotiate in good faith to develop adequate performance standards, remedies, and associated reporting."[185] The 1998 MCI Complaint chronicled MCI's submission to Bell Atlantic of a comprehensive proposal addressing performance reporting, standards, and remedies, followed by Bell Atlantic's tactics to slow and extend the process.

In addition to these complaints to the Commission, MCI has documented that Bell Atlantic has failed to satisfy the conditions to *Bell Atlantic-NYNEX* in at least one other respect. In a filing with the NYPSC, MCI noted that

> BA-South's current [OSS is] different from the systems available in BA-North. MCI has requested that BA-NY identify which systems will be in place in compliance

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all of the terms contained in the conditions to all competing carriers upon request.").

183 See *Bell Atlantic Answer*, AT&T Corp. v. Bell Atl. Corp., File No. E-98-05 (FCC, filed Dec. 15, 1997).

184 *MCI Complaint*, MCI Telecomm. Corp. & MCImetro Access Transmissions Serv., Inc. v. Bell Atl. Corp., File No. E-98-32 (FCC, filed Mar. 17, 1998) ("1998 MCI Complaint").

185 Id. ¶ 8.

with [*Bell Atlantic-NYNEX*], but to date MCI has not received an answer from BA-NY.[186]

Bell Atlantic's failure to implement, within 15 months after the FCC approved its merger with NYNEX (i.e., by November 15, 1998), uniform OSS interfaces covering the entire Bell Atlantic-NYNEX combined regions and its failure to develop uniform interfaces within their current respective regions within 120 days of the Bell Atlantic-NYNEX merger as required by the FCC's Bell Atlantic-NYNEX merger conditions[187] demonstrates that post-merger conditions are ineffective.

As discussed supra, the New York local market remains closed to competition.[188] Moreover, AT&T recently filed with the NYPSC affidavits of several AT&T executives that underscore Bell Atlantic's continued intransigence regarding opening markets in New York. The general problems identified are Bell Atlantic's provisioning of "hot cut" installations, LNP implementation, OSS (among other things, response times for AT&T orders and trouble reports), collocation, and nondiscriminatory trunking.[189] Specifically, AT&T demonstrated that "BA-NY's performance for AT&T in hot cut installations and LNP implementation has been

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186 See MCI Comments filed re: NYPSC Case 97-C-0271, at 12 (Aug. 18, 1998).

187 See *Bell Atlantic-NYNEX* ¶ 13 & App. C ¶¶ 2b, c.

188 See supra n.131 and accompanying discussion.

189 The filings were made subject to the protective order in NYPSC Case No. 97-C-0271. Sprint's Petition, therefore, does not refer to any specific figures or allegations not included in AT&T's public filing.

poor under any standard."[190] AT&T (and its customers) have experienced various technical difficulties with hot cuts including premature cutovers, failure to apply the LNP trigger in the switch, performing the cutover incorrectly, untimely notifying AT&T that facilities are not available, and premature removal of the switch translation by BA-NY.[191] In addition, AT&T complains that "[t]he overwhelming majority of AT&T hot cut orders are not completed by BA-NY within the 5-day interval."[192] Also, "AT&T has thirty-seven pending collocation applications and, with one excuse or another (and sometimes with no excuse), BA-NY essentially admits that it cannot provision a single one in the 76-business day time frame by which even BA-NY defines its Section 271 obligation."[193]

Bell Atlantic-New York also continues to breach the terms of its interconnection contract with Sprint, in which Bell Atlantic expressly agreed to provide UNE combinations to Sprint upon request. As a result, Sprint filed a Petition with the New York Public Service Commission to enforce the terms of the interconnection contract.[194] Moreover, Bell Atlantic-Vermont's

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190 Joint Supplemental Reply Affidavit of Richard E. Fish, Jr., and S. Jeannine Guidry on Behalf of AT&T Communications of New York, Inc., filed in NYPSC Case 97-C-0271, ¶ 8 (Oct. 27, 1998).

191 See id. ¶¶ 27-37.

192 See id. ¶ 47.

193 Supplemental Reply Affidavit of Maureen A. Swift on Behalf of AT&T Communications of New York, Inc., filed in NYPSC Case C-97-0271, ¶ 3 (Oct. 27, 1998).

194 Petition of Sprint Communications Company L.P. for

9% increase in customer complaints tracked by the Vermont Public Service Board from August 1996 (pre-Bell Atlantic-NYNEX merger) to July 1998 (post-Bell Atlantic-NYNEX merger) underscores how mergers can make things worse for consumers. This sampling of serious anticompetitive difficulties that AT&T, Sprint and other companies and consumers have encountered underscore the weaknesses of post-merger conditions.

The FCC's and state commissions' experience overseeing the *Bell Atlantic-NYNEX* conditions exposes the limitations of conditions to govern the future conduct of two local monopolies subsequent to a merger. While many of the foregoing problems have been pending for some time, the 48-month sunset provision continues to toll. And, in addition to its failure to comply with agreed-upon merger conditions, Bell Atlantic continues to erect obstacles to block CLEC attempts to enforce the ILEC's statutory duties.[195] In the interim, Bell Atlantic has little incentive to do anything but drag its feet and contest the best efforts of Sprint and other CLECs to enforce their statutory rights and the merger conditions.

In the 271 context, Congress saw the necessity of adopting a carrot or incentive approach to encourage the entrenched local monopolies to open their markets. Even this approach has been

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Arbitration under Section 16 of an Interconnection Agreement, filed in Case 96-C-0864 (Dec. 2, 1997).

195 See supra n.52 (discussing Bell Atlantic's most recent efforts to compromise Sprint's statutory right to elect another carrier's agreement under Section 252(i)).

strained, as we have learned that the interLATA carrot is not nearly as satisfying a meal as the *de facto* local monopoly. Sections 251 and 252 obligations have also gone unheeded. There is no basis to believe reiteration of these ILECs' legal obligations as merger conditions would help make their fulfillment any more real.

CONCLUSION

The proposed merger is anticompetitive and contrary to the public interest. Sprint respectfully urges the Commission to deny the Application.

Respectfully submitted,

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